Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY WAYNE GINN and
GREGORY WAYNE GINN, P.C.,

Petitioners,

v.

UNITED STATES TRUSTEE, SCOTT SEIDEL,
CHAPTER 7 TRUSTEE, and UNITED MEDICAL
SUPPLY COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To avoid undermining the trust of the American people in the federal judicial system, should Circuit Courts of Appeals apply consistent and uniform standards in determining jurisdiction from a District Court's review of a final Bankruptcy Court order, or should the U.S. Fifth Circuit and other Circuit Courts determine jurisdiction using diverse and contradictory rules, resulting in inconsistent rulings within and between the Circuit Courts of Appeals?

2. Is a United States District Court's Order affirming and remanding for further proceedings, but containing no instructions or directives, the Bankruptcy Court's final Order requiring the unconstitutional taking of property from a post-confirmation plan agent appointed by that Bankruptcy Court, sufficiently final to permit jurisdiction for review to appellate courts?

3. Having refused to conduct a hearing on the due process violations alleged, which in turn cost the Ginn Petitioners $366,000, and having further remanded the case to the Bankruptcy Court without instruction, direction, or requiring the Bankruptcy Court to take any further action, was the United States District Court's ruling sufficient to divest the United States Fifth Circuit Court of jurisdiction or was the Fifth Circuit in error dismissing the appeal before it?

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE

Petitioners:

Gregory Wayne Ginn
Gregory Wayne Ginn, P.C.

There is no parent corporation or publically held company which owns 10% or more of the shares of Gregory Wayne Ginn, P.C., a Texas professional corporation.

Attorneys for Petitioners:

Anthony A. Petrocchi
Christopher M. Weil
WEIL & PETROCCHI, P.C.

Respondents:

United States Trustee
Scott Seidel, Chapter 7 Trustee
United Medical Supply Company, Inc.

Attorneys for Respondents:

Mary Frances Durham
OFFICE OF THE U.S. TRUSTEE

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THOMPSON, COE, COUSINS & IRONS, L.L.P.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. respectfully pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fifth Circuit entered on May 1, 2001, which dismissed their appeal for lack of jurisdiction.

OPINIONS BELOW

The order dismissing for lack of jurisdiction (Appendix ("App.") 1) of the United States Court of Appeals for the Fifth Circuit issued without opinion will not be reported in any official reporter. Similarly, the February 27, 2001 Order denying Motion for Rehearing (App. 2) making final the Orders of January 12, 2001 (App. 3-5; App. 6-7), all entered by the United States District Court for the Northern District of Texas, Dallas Division, have not been designated for publication in any official reporter. The November 17, 1999 Order on Show Cause Hearing (App. 27-28) and the March 3, 2000 untimely entered Findings of Fact and Conclusions of Law thereon (App. 8-26) were both entered by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, but are not designated for publication. As indicted in the references above, copies of each of those orders and findings are included within the Appendices to this Petition for Writ of Certiorari.

JURISDICTION

The Order of dismissal of the United States Court of Appeals for the Fifth Circuit was delivered on May 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and SUP. CT. R. 10 (a), (c).

STATUTE INVOLVED

28 U.S.C. § 158(d)

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

STATEMENT OF THE CASE

The issue presented in this case is whether a district court order affirming the final order of a bankruptcy court below, may deprive an appellant of further review before a circuit court of appeals by adding to that affirming order a statement that the case is remanded for further proceedings, without identifying what those proceedings might be or requiring that any such proceedings take place.

Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. (collectively, "Allied") filed voluntary chapter 11 petitions under the United States Bankruptcy Code on February 10, 1997 and March 25, 1997, respectively, which proceedings were consolidated in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas

Division. On January 22, 1998, that Bankruptcy Court entered Order Confirming Plan and Fixing Deadlines for Filing Certain Claims ("the Confirmation Order"). Appellate Record ("AR") p. 0214.[1] The Effective Date of the Plan of Reorganization, as amended, was to be the "later of (a) May 15, 1998, or (b) the twenty-fifth day after the date on which the Confirmation Order becomes a Final Order." AR p. 0189. However, on January 22, 1998, the Bankruptcy Court also entered its Order Approving Technical Amendments to Second Amended Joint Plan of Reorganization Proposed by Debtors (AR p. 0212), which held, among other things, that "the Plan is amended to reflect that the Plan Agent [Petitioners] shall assume [their] duties ***as of the date on which the Confirmation Order is entered [1/22/98]***" (emphasis added), rather than the Effective Date.

With regard to the retention of professionals post-confirmation, the Plan provided as follows:

> Professionals may receive compensation and reimbursement from the Distributable Cash only in accordance with the following procedure. Each professional seeking compensation or reimbursement shall send a written statement of services rendered and expenses incurred to the Plan Agent, each member of the Plan Advisory Committee, and the Bankruptcy Court. Any objection to such statement must be in writing and sent to the Plan Agent and the Professional.

---

[1] "Appellate Record" or "AR" are references to the record as prepared for the appeal to the District Court and later forwarded to the Fifth Circuit Court of Appeals for consideration in support of Petitioners' designated issues.

> If neither the Plan Agent nor any member of the Plan Advisory Committee objects to such statement within fifteen (15) days after receipt of the statement, the Plan Agent shall pay the amount set forth in the statement.

AR p. 0200, ¶ 7.12(b).

On September 20, 1999, the U.S. Trustee filed a Motion for Order to Show Cause (AR p. 0368), which requested that Petitioners and one professional engaged pursuant to the Plan of Reorganization be required to "prove the reasonableness of the fees received," but did not request disgorgement. AR p. 0371. In response, on October 1, 1999, the Bankruptcy Court entered the Show Cause Order, which ordered Petitioners to appear and show why they should not be caused to disgorge all fees paid by them in connection with the Bankruptcy Case. AR p. 0408. No other professionals were named in or served with the Show Cause Order.

On November 8, 1999, the Bankruptcy Court held a hearing on its Order to Show Cause ("the Show Cause Hearing"). *See*, transcript beginning at AR p. 0948.[2] Sitting for the Bankruptcy Court, Judge Abramson violated fundamental principles of due process at that hearing. Early on the Bankruptcy Court exhibited a bias, predisposition, methods of intimidation, and refusal to allow the cross-examination of witnesses or the presentation of evidence on behalf of the Petitioners.

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[2] Further references herein to that transcript of the Show Cause Hearing begin with the abbreviation "TR." That transcript is part of the record identified in note 1.

By way of example, within the first thirty-eight pages of transcription of the hearing, the Plan Agent's attorney attempted to raise twelve objections concerning the proceedings, all twelve of which were overruled. On three separate occasions, Judge Abramson threatened Petitioners' counsel with contempt and imprisonment if he made any further objections to the manner and means in which the U.S. Trustee was putting on evidence against Petitioners, having a marshal sit behind counsel's table for further intimidation. AR p. 0958; Tr. p. 21, lines 11-17; AR p. 0961; p. 28, lines 12-14; p. 29; AR p. 0962, lines 12-16.

Petitioners' counsel reasonably explained to the Bankruptcy Court that "[m]y point is, you are in a quasi-criminal proceeding here and I'd like to be very careful with the rights of my client, if I may." AR p. 0960; Tr. p. 25, lines 20-22. Judge Abramson, however, apparently did mind, demonstrating that he was not overly, if at all, concerned with the due process rights of Petitioners. Three pages later counsel stated "[y]our Honor, the question was, 'is it clear?' The reason it's not clear is whether or not I'm able to rise and make objections. That's unclear." The Court, "[i]t won't take much more, Mr. Weil. All right, Ms. Durham [attorney for the U.S. Trustee], go ahead." AR p. 0962; Tr. p. 29, lines 12-16. Having set the tone that the Petitioners would not be permitted to complain about any evidence introduced by opponents, Judge Abramson then made clear that the Plan Agent would not be allowed to cross-examine witnesses or present any of their own evidence.

Similarly, Judge Abramson refused such evidence from counsel of the other party who was the subject of

the Show Cause Order. *See, e.g.*, AR p. 1010, Tr. p. 123, line 17 through p. 124, line 18; AR p. 1050, p. 204, line 3 through p. 206, line 17. This preclusion of defensive evidence began early in the hearing, during which the following exchange took place:

Mr. Weil: Your Honor, I have a hearing at 1:30. I was led – I'm simply reporting. I was led to believe that this was only set for this morning. It may be misinformation.

The Court: Okay. Then I'll fashion an order before lunch.

Mr. Weil: Your Honor, would I have an opportunity to present evidence? I shouldn't be punished, nor should my client, for that.

The Court: From what I've heard, I'm going to fashion an order, and you'll have your chance to due evidence later. You can ask – I'll give you a few minutes. It's 11:25. I'll give you a few and then Mr. Weil and Mr. Seider, I'll give you 15 minutes apiece to ask anything important, but I'm going to do an order.

AR p. 0989; Tr. p. 83, line 23 through p. 84, line 2.

Later on in that proceeding, Judge Abramson chose to not even allow the Petitioners' counsel the miserly allocated fifteen minutes to put on evidence he had promised before the noon break, as illustrated by the following exchange:

Mr. Weil: I would urge the Court to reconsider. I've spoken with Mr. Petrocchi during the recess and I had prepared and Mr. Ginn is relying upon me as his lawyer to examine him. I don't think the Court suggests that we

didn't have reason to believe this would reach a conclusion by noon. I will return as rapidly as I can, but I have an engagement elsewhere and would urge the Court to reconsider.

The Court: Well, this case calls out for something to be done. So I'll have to do it. Meanwhile, for now, Ginn, under 105(a), I'm enjoining you, don't you write a check or make a payment of a penny out of the estate as of today. If you've already written one, don't mail it, don't write one, don't pay anything and don't do it indirectly through your employees. Don't spend a penny. . . . I'm envisioning – I could do the order now, from what I've heard. I'm envisioning disgorgement of every professional paid by Ginn to the registry of this Court and I'm envisioning a conversion to Chapter 7.

AR p. 1004; Tr. p. 112, line 17 through p. 113, line 6; p. 113, lines 11-14. Before the Plan Agent's attorneys were allowed to cross-examine any of the witnesses at the hearing and before those attorneys were allowed to present any evidence in his defense at the hearing, Judge Abramson made the following pronouncement:

The Court: Well, I think we've exhausted the record enough. I don't think we need anymore.

Mr. Weil: Any more?

The Court: Any more evidence at all.

AR p. 1050; Tr. p. 204, lines 9-12. Obviously surprised by this declaration, not only the Plan Agent's attorneys but the other respondent's attorneys immediately complained about not being able to cross-examine witnesses or present evidence. Unmoved, Judge Abramson stated:

The Court: All right. Here's my ruling. The evidence is closed. We've explored everything relevant with regard to this show cause hearing and there will be no more evidence in the record. You can take your appeal if you need to, but I'm going to rule.

Mr. Weil: Your Honor, before you do, may I have an opportunity to be heard? And I will not make this longer than 2½ minutes.

The Court: How many?

Mr. Weil: Two and a half.

The Court: All right.

Mr. Seider: Your Honor, may I have –

The Court: I don't want to hear any more of this, Mr. Seider. You're wasting my time. Have a seat.

Mr. Seider: No legal argument, sir?

The Court: Have a seat.

Mr. Weil: You're Honor, I won't – although I'm prepared to make a proffer, I refer the Court to its Order dated October 1, 1999 on page 4, mid-page. The testimony that I would elicit from Gregory Wayne Ginn on behalf of Ginn Respondents, the Plan Agent, are why Ginn did not comply, if he did not comply, with the terms of the Plan compensating himself and other professionals. I would respond and elicit testimony from Ginn as to why he hired David Schiller as the attorney for the Plan Agent, considering Mr. Schiller's lack of experience, relationship to James Moon and the office sharing arrangement for the Plan Agent that the Plan Agent has with Mr. Schiller. And why each and

> every expense item should be reimbursed to him. How he could expend as many hours as he alleges in the Plan Administration and why there has been delay, if there has been delay that's undue in resolving the 401(K) claims and paying unsecured creditors. And towards that end, I tender, as I explained to the Court just before our noon recess, Ginn has retrieved the invoices from his car that were inadvertently left there this morning. They are here. And I'll tender them to the United States Trustee's Office for inspection and copying, if they wish.
>
> Your Honor, Ginn is charged by you with serious matters in the order. He has a right to confrontation. He has right to examine witnesses on his own behalf as well as those who have accused him. He has the right to review letters which the Court and the United States Trustee Office has reviewed and he has a right to respond as the Court ordered him to do. Examination by the United States Trustee does not constitute such an exhaustion of those rights.

AR p. 1051; Tr. p. 206, line 1 through p. 207, line 24.

On November 22, 1999, the Court entered the Disgorgement Order, which is the subject of this appeal, directing that Petitioners were to disgorge payments received no later than 42 days from November 8, 1999. App. 27. That Order also required disgorgement of fees by approximately ten other professionals who were neither named in the Show Cause Order or participated in the hearing thereon. On December 20, 1999, Petitioners

deposited into the registry of the Bankruptcy Court the amount of $366,590.79. AR p. 3298.

Petitioners filed their Notice of Appeal on December 9, 1999 (AR p. 3216), which was timely amended on March 13, 2000 (AR p. 3265), in response to the Bankruptcy Court's entry on March 3, 2000, of its Findings of Fact and Conclusions of Law (App. 8-26) relating to the November 8, 1999 Show Cause Hearing. Those Findings and Conclusions contain inflammatory statements which find no support in what little record was permitted at the Show Cause Hearing. A comparison of the divergent reality of many of those findings with the actual evidence and testimony before or readily available to the Bankruptcy Court is contained in detail in the brief filed with the U.S. District Court on appeal by Petitioners herein, which excerpted analysis is appended hereto. App. 87-113.

The District Court permitted oral argument on appeal, at which November 27, 2000 hearing, that Court, recognizing the inequities resulting from the Bankruptcy Court's actions, withdrew the bankruptcy reference and set the appeals for hearing on the substantive nature of same for Petitioners and all of the professionals who also had appealed the Disgorgement Order. However, by separate Order entered January 12, 2001, the U.S. District Court later set aside its previous withdrawal of the bankruptcy reference, affirmed the Bankruptcy Court, and remanded the appellate matter "for further proceedings not inconsistent with this opinion," notwithstanding that said Order contained no "opinion" and the substantive hearing originally scheduled on the appellate issues was not held. App. 3-5.

Accordingly, Petitioners appealed the District Court's ruling to the Fifth Circuit Court of Appeals, which appeal was submitted to a panel of that Circuit Court. The panel dismissed the appeal for lack of jurisdiction by order of May 31, 2001 (AR 1) in response to a Motion to Dismiss filed by the U.S. Trustee (AR 55-63). It is from the Fifth Circuit's dismissal for lack of jurisdiction that Petition for Writ is sought in these proceedings.

REASONS FOR GRANTING THE WRIT

I. There Exists a Significant Split in Authority among the Different Circuit Courts of Appeals as to the Proper Standard for Determining Finality of an Order of a Bankruptcy Court Which Has Been Affirmed or Reversed by the District Court on Appeal.

This is a case of national importance and effects review of a substantial number of appeals each year, particularly because courts of appeals are faced with the independent obligation to always ascertain their own jurisdiction in every case. *See, e.g., In re Continental Airlines, Inc.*, 932 F.2d 282, 285 (3d Cir. 1991). As discussed with more particularity below, the probability of success of a party seeking rights of review from a final bankruptcy court order affirmed or reversed by the district court, to have that appeal considered by the circuit court of appeals depends not upon the nature of the substance of the appeal but upon the circuit to which that party must appeal.

Third and Second Circuits. The U.S. Court of Appeals for the Third Circuit follows a rule for determination of finality that is directly contrary to that applied by the Fifth Circuit and, if Petitioners in this case had been in the Third Circuit, their right of further appeal would have been allowed. As expressed by the opinion and conclusion of *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 449 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1196, 459 U.S. 1206, 75 L.Ed.2d 440 (1983), the Third Circuit follows the broad rule that "when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of former section 1293(b)."

The *Marin Motor Oil* decision was followed in *In re Continental Airlines, Inc.*, 932 F.2d 282, 285-286 (3d Cir. 1991), in which the bankruptcy court below had ruled that leased aircraft were not within the statutory provision that exempts aircraft leased to an air carrier from the automatic stay, but the district court on appeal had ruled that the aircraft were within the exemption, leaving the way open for further proceedings. The Third Circuit nonetheless found it had jurisdiction "because the order of the bankruptcy court was final, regardless of whether the district court's order would otherwise have been considered final." *Id.*, 932 F.2d at 286. That Court also noted that the U.S. Court of Appeals for the Second Circuit had assumed jurisdiction in what it characterized as an identical dispute, in *In re Pan Am Corp.*, 929 F.2d 109 (2d Cir. 1991) (per curiam), *aff'g*, 125 B.R. 372 (S.D.N.Y. 1991).

Ninth Circuit. The Ninth Circuit adopted the *Marin Motor Oil* analysis in *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 812-815 (9th Cir. 1985), in which the bankruptcy

court below had denied a motion for leave to file a claim as if it were an amendment of an informal claim. On appeal, the district court reversed, granting leave to file the claim. Although acknowledging that ordinarily an order granting leave to file a claim would be deemed interlocutory, the Ninth Circuit accepted the appeal from the district court order, reasoning that the district court order was final in the sense that there remained nothing more for the district court to do. The Ninth Circuit decided it would review the question as if it were reviewing the clearly final ruling of the bankruptcy court, since it was in as good a position as the district court to function as an appellate court. The Ninth Circuit further reasoned that ordinary rules of finality are meant to adjust relationships between appellate courts and trial courts, and do not apply with persuasive force when the court of appeals is reviewing another court exercising appellate functions; and the delay factor is not compelling. *See also, In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1377-1378 (9th Cir. 1985).

That Circuit has more recently reiterated its adherence to this analysis when requested to consider a district court's affirming bankruptcy court findings of fact but vacating the judgment and remanded for further determinations of fact to determine whether the claimant had carried the burden of disproving the bad-debt deductions taken on the debtor's state income tax liability. The Ninth Circuit concluded simply and pragmatically that "the district court's order will be considered final even if it remands for further proceedings in the bankruptcy court." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1243, 520 U.S. 1115, 137 L.Ed.2d 326

(1997); *see also, In re P.R.T.C., Inc.*, 177 F.3d 774, 779-781 (9th Cir. 1999). This result and reasoning is directly contradictory to that applied by the Fifth Circuit panel in the proceedings below.

Sixth Circuit. In the decision of *In re Gardner*, 810 F.2d 87, 90-92 (6th Cir. 1987), the Sixth Circuit Court of Appeals concluded that an appeal could be taken from a district court judgment that reversed a final bankruptcy court determination that an insurance policy did not cover the bankrupt's liability for an automobile accident, but remanded for a determination whether a release given by the bankrupt to the insurer was fraudulent, also following the *Marin Motor Oil* approach.

Eighth Circuit. There appears to be an intra-circuit inconsistency in the U.S. Court of Appeals for the Eighth Circuit, where opinions such as *In re Bestmann*, 720 F.2d 484, 486 (8th Cir. 1983), follow the more liberal approach to siding with a determination of finality, but conflict with the analysis of the panel in *In re Vekco, Inc.*, 792 F.2d 744 (8th Cir. 1986). An open-ended approach was taken by the Court in *In re Olson*, 120 F.3d 98, 101 (8th Cir. 1997), where the Eighth Circuit panel expressly relied upon Third Circuit precedent of *In re Koch*, 109 F.3d 1285, 1287-1288 (8th Cir. 1997).

While the more flexible view of determination of finality in reviewing bankruptcy orders discussed above is not the view adopted by the majority of the circuits, including the Fifth Circuit from which this appeal arises, there is a definite split of authority on this issue and, given the current national economic climate and likely

potential for increased filings of persons seeking bankruptcy relief, makes the disparate treatment of access to appellate review between the circuits of critical import. The lack of a uniform rule or guideline for determination of finality of a district court reversal or affirmance of a final bankruptcy court order requires review and resolution of that split by this United States Supreme Court. Therefore, Petitioners request that this Court grant the writ sought herein and adopt the better reasoned standards followed by the Third and Ninth Circuit Courts.

II. Review Is Further Warranted in this Case Because Regardless of Which Circuit Court's Analysis Is Adopted and Applied, a Candid Review of the District Court's Order Results in the Conclusion That the Order Is Final for Purposes of Appeal under the Fifth Circuit's Previously Adopted Rule.

The Court of Appeals for the Fifth Circuit below has jurisdiction to hear and therefore must hear "appeals from all final decisions, judgments, orders, and decrees." 28 U.S.C. § 158(d). The jurisdictional question that Court was presented with in the instant case, and determined erroneously, is whether, under the facts and issues before it, the United States District Court's orders affirming the Disgorgement Order on Show Cause Hearing and remanding "the case for further proceedings not inconsistent with this opinion" is a "final order" for purposes of appeal.

Accordingly, Petitioners seek review from the decision of the Fifth Circuit Court of Appeals dismissing for lack of jurisdiction the proceeding before it in response to the Motion to Dismiss filed therein by the U.S. Trustee

(App. 55-63). That jurisdictional challenge here arises from the disputed contention that the underlying order of the U.S. District Court appealed from (App. 3-5) was not final, the proceedings having been remanded back to that U.S. Bankruptcy Court by the U.S. District Court. That District Court filed no memorandum opinion in support of its January 16, 2001 Order, which Order states in relevant part:

> The Court separates the remaining appeal by Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Ginn"), formerly Civil Case No. 3:00-CV-1549-X. With respect to Ginn's appeal of the Bankruptcy Court's Show Cause Order, entered November 22, 1999, that Order is **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. With respect to Ginn's appeal of the Bankruptcy Court's Findings of Fact and Conclusions of Law, entered March 3, 2000, those findings and conclusions, are **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. The Bankruptcy Court's Findings were always subject to "some later determination by the Court as to entitlement of fees and expenses, if any." Findings of Fact and Conclusions of Law, at 15-16, ¶8. The Court's ruling today does not preclude Judge Abramson from modifying or vacating his Findings of Fact and Conclusions of Law as needed to effectuate a fair and prompt distribution of the disgorged funds, and to comply with the requirements of procedural due process. The Court **REMANDS** the case for further proceedings not inconsistent with this opinion.

Order, January 16, 2001, p. 2 (App. 4).

Obviously, had this appeal from the District Court been in and taken to a panel in the Third, Ninth, Eighth and perhaps Second or another Circuit Court of Appeals, those panels would have accepted jurisdiction and ruled on the substance of Petitioners' appeal. The Fifth Circuit applied a different standard and analysis for establishing jurisdiction, resulting in dismissal. This diverse and disparate treatment of a litigant's right to appellate review depending upon which Circuit Court is considering the appeal alone is so unjust and inequitable as to require this Court's intervention to provide a clear statement of a single, consistent rule for application of the law in this area. However, even under the Fifth Circuit's application of this jurisdictional "rule," that Court should have denied the Motion to Dismiss and exercised jurisdiction.

III. The District Court's Order Requires No or Only Ministerial Action By the Bankruptcy Court, Having Affirmed, Rather than Reversed the Bankruptcy Court.

The subject January 16, 2001 Order of the District Court below (App. 3-5) was final, and the Fifth Circuit Court of Appeals was in error in its decision to the contrary even following its own stated rule of law on this point, because the operative language of that Order does not *require* the Bankruptcy Court *to do anything*. Although the District Court made clear that it did not "***preclude*** Judge Abramson [for the U.S. Bankruptcy Court] from modifying or vacating his Findings of Fact and Conclusions of Law" (emphasis added), the District Court did not require that the Bankruptcy Court even review those findings and conclusions on remand. When a District

Court's remand order "neither necessitates further fact-finding nor the use of substantial discretion on the part of the bankruptcy court," the subject order is final and appealable. *Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro Snax)*, 157 F.3d 414, 420-21 (5th Cir. 1998).

Because the District Court's directive in that Order imposed no requirement or necessity for the Bankruptcy Court to review, modify, or withdraw its findings of fact and conclusions of law, a "remand" leaves in place the erroneous findings that Petitioners breached a fiduciary duty and were grossly negligent remain in place. The likely and anticipated result will be only the ministerial act of the entry of a "no fee" decision, if any hearing on a fee application is ever held. Under previous decisions in the same Fifth Circuit, that Court of Appeals has determined that, "where a district court's remand entails significant further proceedings, such as additional fact-finding, then the order should not be considered final. ***However, if the remand involves only ministerial proceedings, such as the entry of an order by the bankruptcy court in accordance with the district court's decision, then the order should be considered final.***" *Beal Bank, S.S.B. v. Caddo Parish-Villas South, Ltd. (In The Matter of Caddo Parish-Villas South, Ltd.)*, 174 F.3d 624, 628 (5th Cir. 1999), citing *Aegis Specialty Mktg., Inc. v. Ferlita (In the Matter of Aegis Specialty Marketing, Inc. of Alabama)*, 68 F.3d 919, 921 (5th Cir. 1995) (emphasis added). Because the findings and conclusions of the Bankruptcy Court were affirmed by the District Court (App. 4), and those findings and conclusions, if not withdrawn, are likely dispositive of matters raised in any fee application by Petitioners. These issues, having been framed for appeal

from the Order on Show Cause Hearing of the U.S. Bankruptcy Court (App. 72-73), were and are final and appealable under 28 U.S.C.A. § 158(d).

Before the Fifth Circuit Court of Appeals, in his Motion to Dismiss, the U.S. Trustee relied upon the *Caddo Parish-Villas South, Ltd.* case for the proposition that:

> A long, unbroken line of cases establishes the general rule in this circuit that a district court order is not a final order under section 158(d) where ***that order reverses an order of the bankruptcy court*** and remands the case to the bankruptcy court for significant further proceedings.

Id., 174 F.3d at 626 (emphasis added). The U.S. Trustee further cited in support of his argument the cases of *Aegis Specialty Mktg.* and *Allegheny International Credit Corporation v. Bowman (In re Bowman)*, 821 F.2d 245 (5th Cir. 1987), both of which also involve the case-by-case evaluation of finality of orders ***reversed*** by a United States District Court and then remanded to a Bankruptcy Court for what were determined to be "significant further proceedings."

However, in a footnote in its Motion to Dismiss (App. 62, n. 5), the U.S. Trustee acknowledged that his citations involved only cases in which the Fifth Circuit Court of Appeals had reviewed an order reversing the Bankruptcy Court, but argued that the affirmance of the Bankruptcy Court's order in this case should not affect application of the concept of finality expressed in *Caddo Parish-Villas South, Ltd.*, for which proposition the U.S. Trustee cited no authority and which lacks logical rationale.

In fact, the opposite is the case. Ironically it is from the opinion in *Caddo Parish-Villas South, Ltd.*, the very

case cited by the U.S. Trustee, that the Fifth Circuit Court observed in a more thoughtful moment:

> *Eagle Bus*, the principal case cited by Caddo [Appellant/Debtor], involved the appeal of a district court order ***affirming*** the decision of the bankruptcy court. ***That situation, obviously, is very distinct from a reversal and remand by the district court.***

Beal Bank, S.S.B. v. Caddo Parish-Villas South, Ltd., 174 F.3d at 627 (emphasis added). Accordingly, had the Fifth Circuit panel followed its own precedent, it would have denied the U.S. Trustee's Motion to Dismiss and resolved this appeal on the substantive issues raised by the designated issues and points of error.

IV. The District Court's Denial of Appellants' Jurisdictional Challenges Are Final and Appealable.

A more obvious reason why the Bankruptcy Court and District Court's respective orders should be determined to be final and appealable under 28 U.S.C.A. § 158(d), and the Fifth Circuit Court of Appeals should be directed to acknowledge jurisdiction and proceed with the substance of Petitioners' appeal brought before it, is found from an examination of the points of error raised on appeal by Petitioners. In addition to and certainly no less important than the points of error challenging the Bankruptcy Court's findings and conclusions, Petitioners included the following points of error in their Brief of Appellants filed with the District Court:

I. The Bankruptcy Court violated the constitutional due process rights of Appellants by ordering that Appellants be enjoined from acting as the Plan Agent and disgorge all amounts paid without first providing a full and fair opportunity for hearing.

II. The Bankruptcy Court committed reversible error in ordering Appellants be enjoined from acting as Plan Agent and disgorge all amounts paid without first providing a full and fair opportunity for hearing.

III. The Bankruptcy Court exceeded its authority and jurisdiction in attempting to rely upon 11 U.S.C. § 105 to regulate, modify or unilaterally amend fee agreements between the Plan Agent and professionals or to order disgorgement of the Plan Agent's compensation,

App. 46-47; *see also*, App. 68-73; and identified the following issues, among others, in their Designation of Issues on Appeal filed for consideration by the Fifth Circuit Court of Appeals:

2. Did the United States District Court commit error and/or violate the Ginn Appellants' constitutional rights when it affirmed the Bankruptcy Court's removal of the Ginn Appellants as the Plan Agent without providing those Appellants with a full and fair hearing?

3. Did the United States District Court commit error when it affirmed the Bankruptcy Court's refusing the Ginn Appellants the right to cross examine and present witnesses and/or to present evidence in response to the Order to Show Cause?

* * *

5. Did the United States District Court commit error when it failed to find that the Bankruptcy Court exceeded its authority in using section 105 of the Bankruptcy Code to regulate fee agreements between the Plan Agent and professionals who were not retained under one of the provisions of the Bankruptcy Code governing the hiring of professional persons by a debtor in possession or a trustee?

* * *

7. Did the United States District Court commit error when it determined that the Bankruptcy Court had jurisdiction and authority to issue the ruling set forth in the Show Cause Order under either 11 U.S.C. § 105 or § 1112?

* * *

10. Did the United States District Court commit error when it affirmed the Bankruptcy Court's requiring the Ginn Appellants to seek recovery of disgorged fees and expenses and payment of outstanding fees and expenses in the Converted Chapter 7 proceeding when not acting for a party in the converted case?

* * *

12. Did the United States District Court, after properly removing the bankruptcy reference and requiring the filing of a fee application by the Ginn Appellants and others, commit error by putting the reference back in place prior to conducting a hearing on the Ginn Appellants' fee application?

App. 65-67.

Without question, the District Court's denial of Petitioners' challenge to the Bankruptcy Court's jurisdiction to act at all with respect to the material issues (Point of Error No. III; designated issue nos. 5 and 7) was final and will not be reconsidered or otherwise affected in any way by any proceedings upon the purported "remand" or any subsequent appeal. Similarly, a challenge to the Bankruptcy Court's right to remove and enjoin Petitioners from acting as Plan Agent without compliance with Constitutional due process protections (Point of Error Nos. I and II; designated issue nos. 2 and 3) is beyond the scope of any purported "remand," particularly under a "remand" such as the one in this case that actually requires no action at all from the Bankruptcy Court.

Even if the Bankruptcy Court conducts a hearing regarding the entitlement of Petitioners to fees, that hearing would be carried on without resolving or addressing the jurisdictional argument of Petitioners and would be contrary to Petitioners' assertion that no such jurisdiction lies with the Bankruptcy Court. In other words, even if the District Court remanded this proceeding to the Bankruptcy Court and required a hearing to reconsider the unsupported and untimely findings and conclusions and to make a determination as to the reasonableness of Petitioners' fees (which express remand the District Court did not make as discussed above and can be seen from the face of the January 16, 2001 Order), such remand would not be a directive requiring "significant further proceedings" in the Bankruptcy Court with respect to the other material appellate points raised by Petitioners before the Fifth Circuit and discussed herein. Accordingly, the orders which are the subject of this proceeding

are final and properly appealable under 28 U.S.C.A. § 158(d), the Petition should be granted, and the Fifth Circuit should be directed to exercise jurisdiction over this appeal.

VI. The Bankruptcy Court and The U.S. Trustee Take Inconsistent Positions on Finality in Different Forums, Further Supporting the Position That the District Court Order Is Final and Jurisdiction for Appeal Is Necessary to Correct the Lower Courts' Errors.

Finally, but not without material significance, the U.S. Trustee's argument in the Fifth Circuit Court of Appeals that the appeal before it distracts the parties from "the focus on the real issue in dispute – the propriety of Mr. Ginn's fee request," and that the appeal "is not profitable" for the parties (App. 61), belies the fact that the Bankruptcy Court and the Office of the U.S. Trustee have presented the belated March 3, 2000 Findings and Conclusions for use in other matters as though they are final and a club which may be employed indiscriminately in other forums to beat on Petitioners.

At a hearing before the District Court on November 27, 2001, the following exchange took place between the District Court and an attorney for the U.S. Trustee:

THE COURT: So you do think they're crooks and they're committing fraud. Is that what you're saying?

MS. DURHAM: My personal view?

THE COURT: Yeah. Well, you're the one standing there.

MS. DURHAM: It's that, yeah, there's – that they're self-dealing, yes –

THE COURT: Okay.

MS. DURHAM: – I do. And, in fact, ***the State Board of Accountancy has notified Mr. Ginn they intend to take his CPA license away***. So there's some seriousness – it's a very serious matter and it's –

THE COURT: Okay.

MS. DURHAM: – not over yet.

See, App. 50, quoting the Hearing Transcript of November 27, 2000, p. 63, lines 6-19 (emphasis added). Ironically, what the attorney for the U.S. Trustee failed to add to this inflammatory statement, in addition to the fact that no hearing has been held nor any determination made in those proceedings, is that Judge Harold Abramson, the judge of the Bankruptcy Court from whose order appeal is sought herein, is the one who filed the complaint (App. 74-75), sending the untimely entered March 3, 2000 Findings and Conclusions to the Texas State Board of Accountancy shortly after entry of same.

In response to Petitioners' Interrogatories (App. 76-82) in that administrative proceeding, the Enforcement Division of the Texas State Board of Public Accountancy (App. 83-86) identified Judge Abramson as the person filing the complaint (Response to Interrogatory No. 2, App. 83) and Mary Frances Durham of the Office of the U.S. Trustee as the Judge's agent in those proceedings (Response to Interrogatory No. 21, App. 86). The Texas State Board of Accountancy plans to rely upon only those

March 3, 2001 Findings and Conclusions to support the complaint filed by Judge Abramson against Petitioners. *See*, Responses to Interrogatory Nos. 4, 5, and 6, App. 84, regarding the Texas State Board of Accountancy not relying upon fact or expert witnesses, and Responses to Interrogatory Nos. 9 and 12-19, and particularly No. 9, App. 84-86, evidencing the State Board's intent to rely solely on the Bankruptcy Court's findings and conclusions.

If the Bankruptcy Court intended to conduct a full, fair, and impartial hearing on the entitlement of Petitioners to fees in the future, as opposed to the entry of an order supported by its previous purported "preliminary" findings and conclusions, such intent does not square with the Bankruptcy Court's conduct in this other forum. The problem Petitioners now face is that the "remand" of the District Court *requires* the Bankruptcy Court to do absolutely nothing at all and allows further abuse by a judge unconcerned with constitutional requirements of due process. Because the District Court's Order does not contain any express or specific requirements of any, let alone significant, further proceedings for remand, the subject Orders are final for purposes of appeal.

In light of the matters addressed above, one might inquiry as to the Bankruptcy Court's purpose for entering findings and conclusions months after the subject Disgorgement Order was appealed to the United States District Court. It is a general and well established rule that the taking of an appeal transfers jurisdiction from the bankruptcy court to the district court with regard to any matters involved in the appeal and divests the bankruptcy court of jurisdiction to proceed further with such matters. *Midwest Properties No. Two v. Big Hill Investment*

Co., Inc., 93 B.R. 357, 360 (N.D.Tex. 1988), *citing Ingersoll-Rand Financial Corp. v. Kendrick Equipment Corp. (In re Kendrick Equipment Corp.)*, 60 B.R. 356 (Bankr.W.D.Va. 1986). *See also, In re Combined Metals Reduction Company*, 557 F.2d 179 (9th Cir. 1977); *In re Bialac*, 15 B.R. 901 (Bankr. 9th Cir. 1981), *aff'd*, 694 F.2d 625 (9th Cir. 1982); *In re Excavation Construction, Inc.*, 8 B.R. 752 (D.Md. 1981); *In re Urban Development Ltd, Inc.*, 42 B.R. 741 (Bankr.M.D.Fla. 1984); *In re Hardy*, 30 B.R. 109 (Bankr. S.D.Ohio 1983). Under FED.R.CIV.P. 52(b), the Bankruptcy Court ceased to have jurisdiction to issue findings of fact or conclusions of law ten days after it issued the Disgorgement Order. *Midwest Properties No. Two v. Big Hill Investment Co., Inc.*, 93 B.R. at 360, *citing In re Texas Extrusion Corp.*, 836 F.2d 217, 220-21 (5th Cir. 1988) ("[t]his 10 day period of Rule 52(b) is jurisdictional and cannot be extended in the discretion of the court"), *citing Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980). And yet, notwithstanding the authorities and legal principles set forth above, the Bankruptcy Court used such findings and conclusions entered during a time it had no such jurisdiction to support a complaint against Petitioners in another forum.

Perhaps a more pressing question to ask is: if these March 3, 2000 Findings of Fact and Conclusions of Law are only preliminary and were made in anticipation of a full, fair, and impartial hearing on the issue of reasonableness of Petitioners' fees as asserted by the U.S. Trustee, why would the judge of a United States Bankruptcy Court, putatively "represented" by the U.S. Trustee's office (App. 74-75 and 83-86), an adverse party in active proceedings before that same Court (*see, e.g.*, App. 55-63), present a contemporaneous complaint in a

different forum supported by and under the pretense, if not express representation, that the findings and conclusions were final? It is clear that when not raised as a purported basis for a request for dismissal, the Bankruptcy Court and the U.S. Trustee consider those findings and conclusions final and binding, which will require no further review "on remand." The inconsistent arguments to the contrary made by the U.S. Trustee before the Fifth Circuit Court of Appeals (App. 55-63) are not credible and should be discounted and rejected by this Court.

Petitioners also note that before the U.S. District Court on January 11, 2001, Gerrit Pronske, counsel for the Trustee, Scott Siedel, orally acknowledged that at least some of the Bankruptcy Court's Findings of Fact were not supported by the record.

Under all of the circumstances discussed in this Petition, Petitioners urge the Court to grant this request, more closely examine the record and the Court's findings, and require the Fifth Circuit to acknowledge jurisdiction and substantively rule upon the validity of such findings and conclusions, made final by the District Court's Order affirming same.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10501

In The Matter Of: ALLIED PHYSICIANS GROUP

Debtor

GREGORY WAYNE GINN; GREGORY WAYNE GINN P C

Appellants

v.

UNITED MEDICAL SUPPLY INC; UNITED STATES TRUSTEE; SCOTT SEIDEL

Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

(Filed May 31, 2001)

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee, United States Trustee, to dismiss appeal for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that the motion of appellee, United States Trustee, to suspend briefing notice is DENIED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLIED PHYSICIANS GROUP, P.A., and ALLIED PHYSICIANS OF DFW, INC., Debtors	§	Case No. 3:00-CV-616-X
SCHILLER, PLLC and DAVID SCHILLER, ET AL, Appellants, v. UNITED MEDICAL SUPPLY, ET AL., Appellees.	§	

ORDER

(Filed Feb. 27, 2001; Entered Feb. 28, 2001)

Before the Court is Appellant Ginn's Motion for Rehearing or for New Trial, filed January 26, 2001. The Motion is **DENIED.**

SO ORDERED.

Dated: February 27th, 2001.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§
ALLIED PHYSICIANS GROUP, P.A., and ALLIED PHYSICIANS OF DFW, INC.,	§ Case No. 3:00-CV-616-X § Consolidated with: § Case No. 3:00-CV-1073-X § Case No. 3:00-CV-1315-X § Case No. 3:00-CV-1549-X
Debtors	§
SCHILLER, PLLC and DAVID SCHILLER, ET AL,	§
Appellants,	§
v.	§
UNITED MEDICAL SUPPLY, ET AL.,	§
Appellees.	§

ORDER

(Filed January 12, 2001; Entered January 16, 2001)

(1) Disposition of Appeals.

On this, the 11th day of January, 2001, the parties announced that settlements have been reached with Anthony A. Petrocchi; Hiersche, Martens, Hayward, Drakely & Urbach, P.C.; and David A. Schiller and David A. Schiller ("Schiller"), PLLC with respect to the matters raised in the pending appeals, and by the subsequently filed Fee Applications and pleadings. The appeals of

those three parties in this consolidated appeal are therefore **DISMISSED** as moot.

The Court separates the remaining appeal by Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Ginn"), formerly Civil Case No. 3:00-CV-1549-X. With respect to Ginn's appeal of the Bankruptcy Court's Show Cause Order, entered November 22, 1999, that Order is **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. With respect to Ginn's appeal of the Bankruptcy Court's Findings of Fact and Conclusions of Law, entered March 3, 2000, those findings, reflecting Judge Abramson's preliminary findings and conclusions, are **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. The Bankruptcy Court's Findings were always subject to "some later determination by the Court as to entitlement of fees and expenses, if any." Findings of Fact and Conclusions of Law, at 15-16, ¶ 8. The Court's ruling today does not preclude Judge Abramson from modifying or vacating his Findings of Fact and Conclusions of Law as needed to effectuate a fair and prompt distribution of the disgorged funds, and to comply with the requirements of procedural due process. The Court **REMANDS** the case for further proceedings not inconsistent with this opinion.

(2) Withdrawn Reference as to Fee Applications.

On November 27, 2000, this Court withdrew the reference with respect to the determination of the Fee Applications of Anthony A. Petrocchi; Hiersche, Martens, Hayward, Drakely & Urbach, P.C.; David Schiller; and

Gregory Wayne Ginn.[1] While three of the parties have settled, Ginn's Fee Application is still pending. Ginn's Fee Application and related claims asserted against him are hereby **REFERRED** back to the Bankruptcy Court for determination.

SO ORDERED.

Dated: January 11th, 2001.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

---

[1] The Court withdrew the reference as to Appellants' fee requests with an Order from the bench on November 27, 2000; an order in written form was entered on December 20, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
ALLIED PHYSICIANS GROUP, P.A., and ALLIED PHYSICIANS OF DFW, INC.,	§	Case No. 3:00-CV-616-X
	§	Consolidated with:
	§	Case No. 3:00-CV-1073-X
	§	Case No. 3:00-CV-1315-X
	§	Case No. 3:00-CV-1549-X
Debtors	§	
	§	
SCHILLER, PLLC and DAVID SCHILLER, ET AL,	§	
	§	
Appellants,	§	
	§	
v.	§	
	§	
UNITED MEDICAL SUPPLY, ET AL.,	§	
	§	
Appellees.	§	

ORDER

(Filed January 12, 2001; Entered January 16, 2001)

Before the Court are: the Chapter 7 Trustee's Motion for Continuance or Stay, filed January 3, 2001; and Appellee United Medical Supply Co., Inc.'s Motion to Dismiss Appeal as Moot and to Change Caption, filed January 5, 2001.

(1) Chapter 7 Trustee Scott Seidel's Motion for Continuance is **DENIED** as moot. The remaining hearings set

for January 12, 2001 have been cancelled by a separate order.

(2) United Medical's Motion to Dismiss Appeal as Moot is **DENIED.** The Court's disposition of the pending appeals is governed by a separate order and for the reasons given therein.

(3) United Medical's Motion to Change Caption is itself **DENIED** as moot. Gregory Ginn's Fee Application and related proceedings have been referred to the Bankruptcy Court by a separate order, and that Court may caption the Fee Application proceedings as it sees fit.

SO ORDERED.

Dated: January 11th, 2001.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
Allied Physicians Group, P.A.	§	**Case No. 97-31267-HCA-7**
	§	**Case No. 97-32616-HCA-7**
Allied Physicians of DFW, Inc.	§	**Jointly Administered Under Case No. 97-31267-HCA-7**
	§	
Debtors.	§	

(Entered March 3, 2000)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came before the Court on November 8, 1999, the Order to Show Cause issued to Gregory Wayne Ginn and David S. Schiller in the above-referenced case. After consideration of the testimony and evidence, the Court makes the following findings of fact and conclusions of law.

Background

Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. filed voluntary chapter 11 petitions on February 10, 1997, and March 25, 1997, respectively, and had no operations at the time of filing. Allied Physicians Group, P.A. was owned by a group of medical doctors. The primary asset of Allied Physicians Group, P.A. was 100% of the stock of Allied Physicians of DFW, Inc., whose business was to collect accounts receivable for the physicians and pay salaries, benefits, vendors, and office expenses. The cases were administratively consolidated, and an official unsecured creditors' committee hired counsel and was active in the proceedings.

The debtors, with the contribution and approval of the official unsecured creditors' committee, filed a liquidating Plan. The Court held an evidentiary hearing on December 31, 1997, at which time the Court was presented with a "Second Amended Joint Plan" that had not yet been filed, and after urging from the debtors and the unsecured creditors' committee, the Court orally confirmed the Plan. The Court signed the Order confirming Plan and an Order Approving Technical Amendments on January 22, 1998.

At the confirmation hearing on December 31, 1997, the Court expressed its concern that post confirmation professional fees may unnecessarily reduce the amount of funds available for creditors. The counsel for the committee, Gerald Urbach, represented to the Court that the individual selected to act as Plan Agent was "not going to make any money doing this," and, generally, that the Plan Agent would not be paying a lot of money out to professionals. Mr. Urbach assured the Court that it had considered the effect of professional fees on the disbursement to creditors, and had in place sufficient procedures to make sure a drain on the estate by professionals would not happen. The Court hadn't had an opportunity to review the "Second Amended Joint Plan" (hereinafter "Plan") and inquired of the debtor's representative whether professionals employed in the case would be required to seek Court approval prior to receiving payments. The witness responded to the Court, "yes."

The confirmed Plan, which wasn't filed until January 21, 1998, was the instrument that created the position of "Plan Agent" and identified Gregory W. Ginn as the Plan Agent in paragraph 1.69, by defining "Plan Agent" as

"Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. or any such other person as the committee may designate." The committee dissolved at confirmation and did not designate a different person or entity to serve as Plan Agent.

The Plan Agent's powers and duties were set forth in Article 7 of the Plan and included the power to sue on behalf of the creditors (Plan paragraph 7.4), manage the affairs of the "reorganized debtors," consummate sales of assets, enter into contracts (Plan paragraph 7.5), investigate and prosecute causes of action (Plan paragraph 7.9). The Plan gave the Plan Agent broad discretion to recover assets, whether by law suit or sale, sell assets, and enter into agreements to accomplish the same.

The Plan required the Plan Agent to "conserve, protect, collect and liquidate or otherwise convert into cash all assets," (Plan paragraph 7.5) and deposit all funds "with an entity that has been approved by the Office of the United States Trustee as an approved entity for maintenance of debtor-in-possession bank accounts," (Plan paragraph 7.11) and "keep records reflecting Distributable Cash" (Plan paragraph 7.15).

The Plan, in Paragraphs 7.12, 13.1(b), 13.1 (g)13.1 (l), and 13.1(n) gave the Bankruptcy Court the authority to review professional fees sua sponte, and to hear and determine professional fee applications, other requests for payment of fees and expenses to be paid from the estate, matters which might arise in connection with the implementation or enforcement of the Plan, and any other matter not inconsistent with the Bankruptcy Code.

The Plan addressed Mr. Ginn's fees and fees of those professionals Mr. Ginn might employ in paragraph 7.12. Plan paragraph 7.12(a) stated that Mr. Ginn could be compensated at the hourly rate of $160.00 and be reimbursed for reasonable out-of-pocket expenses incurred in the performance of his duties. The Plan did not authorize Mr. Ginn to hire his office staff or set forth any other hourly rate at which he could bill the estate.

Under paragraph 7.12(b), Mr. Ginn could pay professionals he hired only after the professional had (1) filed a fee statement with the Bankruptcy Clerk; and (2) submitted the fee statement to the Plan Advisory Committee. The Bankruptcy Court would not conduct a hearing on the fee request unless an objection was filed. This Plan provision was to ensure that creditors could review the fee requests at the Clerk's office, and, therefore, independently review Mr. Ginn's use of professionals and estate money.

The Plan Advisory Committee was defined in Plan paragraph 1.68 as three specific individuals, each of whom had fifteen days to register an objection to any fee request. If Mr. Ginn did not receive an objection within fifteen days, he could pay the professional. The Plan did not permit the substitution of members on the Plan Advisory Committee.

The Plan, at paragraph 1.38, defined the Effective Date for the Plan as May 15, 1998. The Order Confirming the Plan, at paragraph K, and the Plan at paragraph 7.12, required every professional asserting a fee claim for services rendered and expenses incurred before the Effective Date to file a fee application and serve it on the United

States Trustee, debtor's counsel and the committee's counsel within one hundred eighty days of the Effective Date, or be forever barred. This procedure is repeated in the Technical Amendments to the Plan which were approved on January 22, 1998. Therefore, any professional seeking to be compensated for work performed on or before May 15, 1998, was required to file a fee application with the Court and serve it on the committee, United States Trustee, and debtors' counsel before the Plan Agent was authorized to pay the professional. The Court set hearings in November 1998 for all the professional fee applications falling in this category.

For professional services rendered after May 15, 1998, the professional was required to send his request to the Plan Agent, each member of the Plan Advisory Committee, and the Bankruptcy Court. Any objections were to be sent to the Plan Agent and the professional within fifteen days. Should the Plan Agent receive no objection within fifteen days, the Plan Agent was authorized under the Plan to pay the professional. Should the Plan Agent receive an objection, the Bankruptcy Court would hold a hearing to resolve the matter. Plan paragraph 7.12(b) also granted the Bankruptcy Court the ability to hold a hearing to determine the reasonableness of any fee request, sua sponte.

The fee applications heard in November 1998 purportedly included all professional time billed and expenses incurred prior to the Effective Date of May 15, 1998. The Bankruptcy Court conducted the fee hearings as "final" fee hearings for work performed prior to May 15, 1998. No professional who appeared for a final fee hearing disclosed to the Court that Mr. Ginn had paid them for

work performed before and after the Effective Date without any compliance with the terms of the Plan.

The Court considered and ruled on the Plan Agent's objections to claims and several adversary proceedings in 1999. In mid-1999, the Bankruptcy Court orally asked the Plan Agent's counsel, Mr. Urbach, who was formerly counsel for the unsecured creditors committee, to have the Plan Agent file a status report. On September 17, 1999, the United States Trustee filed his Motion for an Order to Show Cause, alleging that the Plan Agent improperly paid approximately $2,000,000.00 to professionals, including the Plan Agent himself. On September 20, 1999, Mr. Ginn filed his Status Report which confirmed the United States Trustee's allegations.

The Plan Agent's Status Report stated that Mr. Ginn paid himself $101,593.12 for services prior to the Effective Date and at least $13,081.60 for rent incurred prior to the Effective Date. In addition, the Status Report stated that Mr. Ginn paid himself an additional $240,742.07 for services after the Effective Date, and $11,173.92 for additional rent after the Effective Date.

The Status Report stated that Mr. Ginn paid attorney David A. Schiller $73,000.50 for services rendered prior to the Effective Date, and an additional $101,554.83 for services rendered after the Effective Date, all without Mr. Schiller filing any fee statement with the Court or submitting his bill to the Plan Advisory Committee.

At the final fee hearing in November 1998, Mr. Urbach misled the Court into thinking that it was ruling on all fees for that law firm through the Effective Date. The Bankruptcy Court awarded Mr. Urbach $47,000

which Mr. Ginn paid within two days of the entry of the order. The Status Report states that Mr. Ginn paid Mr. Urbach an additional $32,250.28, at the same time he paid him the $47,000 approved by the Court. Mr. Ginn's payment to Mr. Urbach was for work performed before and after the Effective Date, but before the professional complied with the terms of the Plan. Mr. Urbach represented to the Bankruptcy Court, at the final fee hearing in November 1998, that he was seeking Court approval for all fees earned and expenses incurred prior to the Effective Date of May 15, 1998, which was a misrepresentation. The Status Report reflects that, in truth, Mr. Urbach had filled Mr. Ginn at least $32,250.28 by November 1998, but had not submitted those invoices to the Court or the Plan Advisory Committee.

The transcript of the confirmation hearing (Exhibit K-14), reflected testimony that the debtor had, on December 31, 1997, $747,250 in cash, $2,700,000 in gross receivables at a collection firm in excess of $1,000,000 in receivables not placed with a collection firm, a collectible judgement in the amount of $233,992.52, and causes of action with an unstated value. The Plan Agent's Report stated that his beginning cash balance was only $470,496.17, and, that in the twenty months he acted as Plan Agent, Mr. Ginn collected only $128,100.23 of the $2,700,000 receivables and $40,877.08 of the $1,000,000 of receivables. The Report states that Mr. Ginn collected $1,853,749.25 from litigation and about $120,000 from interest income.

Based on the United States Trustee's motion and the facts contained in the Plan Agent's Status Report, the Court issued its Order to Show Cause on October 1, 1999,

setting a hearing for November 8, 1999. The Show Cause Order required Mr. Ginn to submit documentation to the Court and appear at the hearing to respond to certain questions. In addition, the Show Cause Order directed David Schiller to appear and show cause why he should not be made to disgorge the fees he received.

Mr. Ginn produced some of the exhibits as outlined in the Order to Show Cause, but he did not bring his copy of the exhibits with him to the Show Cause hearing and did not file a response to the Show Cause Hearing. Christopher Weil, who represented Mr. Ginn in his Plan Agent capacity, appeared and announced he was representing Mr. Ginn at the Show Cause hearing.

David Schiller appeared and, Mitchell A. Seider, a Houston attorney with the firm of Sheinfeld, Maley and Kay, appeared to represent him, for the first time, at the hearing. Mr. Seider's firm has a Dallas office; nevertheless, the court admitted Mr. Seider pro hac vice at the commencement of the Show Cause hearing, which was Mr. Seider's first appearance in the case. Mr. Schiller did not file a response within the required time, but filed various papers and proposed exhibits minutes before the hearing. Therefore, neither the Court, the United States Trustee, nor any interested party was able to review them meaningfully prior to the hearing.

Jurisdiction

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This Matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),

(L) & (O). This matter arises under the provisions of a plan of reorganization and under the Court's authority granted under 11 U.S.C. §§ 105 and 1112. The Court makes the following findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7052:

Findings of Fact

1. Mr. Ginn is a Certified Public Accountant and Certified Fraud Examiner. Mr. Ginn is well-educated and articulate as to what information he wants to speak about. The confirmed Plan authorized Mr. Ginn to act as Plan Agent, yet Mr. Ginn testified that he never read the Plan, and that he was not aware of its contents. The Court finds Mr. Ginn's testimony not credible. Mr. Ginn knew that he derived any and all authority he had from the confirmed Plan; he has acted before as a plan agent or liquidating trustee. There were no other written or oral agreements on which Mr. Ginn could have relied. Mr. Ginn testified that he was not operating under the Plan.

2. Mr. Ginn was present at the confirmation hearing on December 31, 1997, and testified about his role in carrying out the terms of the Plan at that hearing. The Court made him aware of its concerns that professional fees not consume the estate to the detriment of creditors. The Plan contained only a few provisions to protect the estate, and Mr. Ginn disregarded every one of them. For example, he disregarded the requirement that fee statements be sent to the Court and to the committee; and he changed the composition of the committee that he was to

review the fees within days of confirmation and without authority.

3. The Plan required Mr. Ginn to maintain estate funds in a depository approved by the United States Trustee. This requirement means, generally, that Mr. Ginn was required to keep the estate funds in an FDIC insured banking institution, which is not an onerous requirement.

4. Mr. Ginn testified that he did not keep estate funds in an FDIC insured banking institution nor was he aware of this provision in the Plan. Instead, Mr. Ginn gave $300,000 of estate money to a friend, Waylon E. McMullen[1], as a loan on a handshake. Mr. Ginn not only loaned estate funds to a friend, but did not require a writing to require the repayment of the funds. Mr. Ginn's actions violated the terms of the Plan and fell beneath a standard of any reasonable business judgement. This was a breach of his fiduciary duty. This action alone supports a determination that Mr. Ginn was grossly negligent, breached his fiduciary duty to creditors and violated a material term of the Plan.

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[1] Subsequent to the Court's ruling, the Court determined from Court records that a federal district Court in the Middle District of Tennessee convicted Mr. McMullen of money laundering, theft of federal funds and conspiracy to defraud the government, apparently involving Medicare funds. The district Court had Mr. McMullen arrested on October 30, 1996, and convicted him in September 1999. Mr. Ginn knew or should have known that Mr. McMullen was charged with violating Title 18 at the time he loaned him $300,000 of creditor's money. Since the Court was not aware of this fact on November 8, 1999, it did not enter into the Court's consideration of this matter.

5. Mr. Ginn's time records (Exhibit B) reflect that his employee billed time to transfer funds to Comerica Bank on April 7, 1998, three months after Mr. Ginn took possession of the debtor's bank accounts. Mr. Ginn's bank statements (Exhibit G) reflect that there was a customer withdrawal for $300,000 on April 8, 1998. Mr. Ginn testified that he did not transfer funds to Comerica Bank, but he loaned that money to Waylon E. McMullen. Mr. Ginn did not document the load by writing a check or requiring Mr. McMullen to sign a promissory note. There was no testimony about what relationship Mr. Ginn and Mr. McMullen had at the time, and whether Ginn had an interest in where the money was going.

6. As the Plan Agent, Mr. Ginn owed creditors a duty as a fiduciary. By disregarding clear and simple terms of the Plan, such as the requirement to keep all funds in an FDIC insured institution, he breached his duty to creditors and the estate. By loaning a large sum of money, about half of all money in the estate at the time, to a friend, without a writing as evidence, he placed all of that money at risk. There was no evidence, aside from Mr. Ginn's self-serving statement, that any of that money has been repaid to the estate.

7. Although Mr. Ginn was aware of the Court's concern that professional fees might consume the estate, Mr. Ginn ignored the Plan provisions to protect estate money from unnecessary dissipation. He did not require any professional to submit a copy of their bill to the Court before he paid them. The Plan was clear that each professional must so comply. In response to the Show Cause item directing Mr. Ginn to produce each and every

document evidencing the fact that the professional complied with the Plan before he was paid, Mr. Ginn produced nothing. Mr. Ginn did not require any professional to comply with the terms of the Plan before he paid the fee and expense.

8. In response to the Show Cause item which required Mr. Ginn to produce the bill received which caused him to pay each professional, Mr. Ginn produced only the cover letters requesting payment. The Plan was clear in stating that before Mr. Ginn should pay any professional, the professional was to submit his invoices to the Plan Agent, the Plan Advisory Committee and the bankruptcy Court. None of the professionals complied with this procedure; nevertheless, Mr. Ginn paid the professionals in full and promptly. In fact, not one professional, including Mr. Ginn himself, complied with the terms of the Plan before accepting payment of estate funds.

9. Mr. Ginn did not require any professional to submit invoices to the Court before he paid the invoice. (Exhibit C) The contracts between professionals and the Plan Agent showed that at least two contracts recited, verbatim, Plan paragraph 7.12 which required each professional to file his invoices with the Court. Weil & Petrocchi's contract and both of David Schiller's contracts state the Plan language. Mr. Urbach, apparently, did not have a written contract, but a "verbal" one according to his letter dated November 13, 1998. Mr. Urbach's letter also recites the Plan's language.

10. Exhibit C included a letter dated November 13, 1998, from Mr. Urbach to Mr. Ginn requesting payment of

invoices. The letter recites that Mr. Urbach was "filing or have filed copies of the [i]nvoices with the Bankruptcy Court" and ask Mr. Ginn to "[p]lease have these [i]nvoices reviewed by the committee." Mr. Urbach's letter then demands payment be made November 20, 1998, seven days after the date of the letter. Clearly, Mr. Urbach was familiar with the Plan requirement regarding the payment of fees. The docket reflects that Mr. Urbach never did file the invoices with the Bankruptcy Court.

11. Mr. Ginn testified that he replaced the members of the Plan Advisory Committee with a business associate, James Moon, and Mr. Moon's former law associate, Eric Liepins. Mr. Ginn admitted that the Plan did not give him authority to alter the composition of the Plan Advisory Committee, but he did it anyway because he thought the true members of the Plan Advisory Committee would be critical of attorney fees. Mr. Ginn did not notify any member of the Plan Advisory Committee that he had removed them.

12. Mr. Ginn knew and understood that the point of having a Plan Advisory Committee was to provide for an honest review of professional bills in this case, yet he found a way to circumvent the Plan's protection of estate money. By appointing his personal sycophants, Mr. Ginn insured that he could expend all or a substantial portion of the creditors' money on himself, his employees, attorney David Schiller, as well as the professionals of Mr. Ginn's choosing.

13. Mr. Ginn's billing records reflect that he did not review any fees. Mr. Ginn bills just a few hours over a twenty month time period to review only one or two fee

invoices out of the dozens he received. He bills every month for an employee to put the fee invoice in a binder and send a letter to Mr. Moon and Mr. Liepins. Neither Mr. Moon nor Mr. Liepins made any written comment about any fees. Mr. Schiller testified that he and Mr. Moon are in a law partnership together.

14. Mr. Schiller and Mr. Ginn share office space. Mr. Ginn testified that about a month after the Court confirmed the Plan that authorized him to be the Plan Agent, Mr. Schiller moved into Mr. Ginn's office space. The contract between Mr. Schiller and Mr. Ginn as Plan Agent for Mr. Schiller to provide attorney services is dated four days after the Court signed the confirmation order. The testimony was that Mr. Schiller moved in with Mr. Ginn approximately one week later.

15. Mr. Ginn and Mr. Schiller testified about the payment to Mr. Schiller of a contingency fee on an insurance settlement. Mr. Ginn stated he had two contracts with Mr. Schiller to perform legal services. Mr. Schiller was a two-year lawyer who was hired by Mr. Ginn at a substantial hourly rate for services under one contract. The other contract was a contingent fee contract. Both contracts recited, verbatim, Plan paragraph 7.12, requiring Mr. Schiller to file his fee requests with the Court and the Plan Advisory Committee. The contingent fee contract pertained to a particular insurance case and had a contingency fee based on net proceeds. Mr. Ginn and Mr. Schiller ignored the contract and paid Mr. Schiller a percentage of gross proceeds without submission to the Plan Advisory Committee.

16. The documentary evidence indicated that Mr. Schiller deposited the insurance settlement check of $1,350,000 in his IOLTA account for one day before transferring the funds to a personal account or certificate of deposit with his bank. Mr. Schiller transferred $985,828 to his client, Mr. Ginn eight days later, apparently retaining his fee and the interest earned. The bank records reflect that two days later, Mr. Ginn had Mr. Schiller deposit the entire $1,350,000.00 in Mr. Ginn's Plan Agent account, and, the, Mr. Ginn wired the fee back to Mr. Schiller. Both Mr. Ginn and Mr. Schiller testified that they did not know why they did not pay a contingency fee based on a percentage of the net recovery or what became of the interest earned on the $1,350,000. The documentary evidence indicates that Mr. Schiller kept the interest earned in his personal account.

17. Of the approximate $2,100,000 Mr. Ginn admits to collecting for the creditors, his Report states that he paid approximately $1,000,000 to himself and the attorney with whom he shares office space, paid approximately $400,000 to other professionals for post-confirmation work, and retained $652,030. Except for the payment of a small, secured claim of approximately $40,000, Mr. Ginn has not paid a single creditor any of the $2,600,000 of which he ultimately controlled.

18. Mr. Ginn commenced the case with $470,496.17, collected receipts of $1,141,763 for a total of $2,612,259. He paid about $1,000,000 to himself and Schiller and another $1,000,000 to other attorneys.

19. The Internal Revenue Service wrote Mr. Ginn and asked him to file tax returns for the estate. Mr. Ginn

testified that he did not file tax returns because he did not think it was important.

20. After two years, Mr. Ginn holds an estate with about the same amount of money with which he started, having spent substantially all increments of increase.

Conclusions of Law

1. Under the provisions of the Plan, and generally as the person with the authority to wind up the affairs of the estate, the Plan Agent was a fiduciary to the creditors of the bankruptcy estate that were to be paid from the "trust" created under the Plan. *See Gonzalez v. State*, 954 S.W.2d 98, 106 (Tex.App. – San Antonio 1997, no pet.) (a person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking); *see also, Holywell v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992) (liquidating trustee is a "fiduciary" for purposes of paying post-confirmation taxes).

2. The Court finds that Mr. Ginn has intentionally breached his duty as a fiduciary to the creditors under the Plan, and he has also acted in a grossly negligent manner. Mr. Ginn did not check any professional's bill for propriety or for compliance with the Plan, and hired more attorneys than were necessary to carry out estate business. He loaned creditor's money, without a writing of any kind, to an individual who had been indicted on several federal fraud counts when the Plan required him to keep all money in federally insured institutions. Mr. Ginn allowed his attorney to move into his office space with him, and paid the attorney over $600,000 in legal

fees, while they shared office space. Mr. Ginn has failed to file tax returns or properly account for cash disbursements and receipts, and failed to properly account for assets in his possession. Mr. Ginn's testimony at the hearing was not credible.

3. The evidence presented at the hearing indicates that Mr. Schiller and Mr. Urbach aided and abetted Mr. Ginn in breaching his fiduciary duties. Parties who knowingly join a fiduciary in breaching his fiduciary duties are jointly and severally liable with that fiduciary.[2] *Jackson v. Smith*, 254 U.S. 586, 589, 41 S.Ct. 201-01 (1921); *see also, Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942).

4. Mr. Schiller's testimony at the hearing was not credible, and he failed to properly explain why (1) he did not comply with the provisions of the Plan when requesting fees; (2) he received fees for work he did before the effective date of the Plan without court approval; (3) the contingency fee paid to him was not based on a percentage of the net recovery after his hourly fees were subtracted; and (4) what became of the interest earned on the $1,350,000.

5. There was no credible explanation as to why the professionals were paid for fees incurred after the plan confirmation when they did not file fee statements as required under the Plan, and did not receive court

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[2] Further investigation on this point with regard to Mr. Schiller and Mr. Urbach, as well as other professionals hired by Mr. Ginn, will need to be made by the U.S. Trustee's Office and the Chapter 7 Trustee.

approval for fees incurred post-confirmation, but prior to the effective date.

6. Mr. Ginn was not a "watchdog" for the creditors as this Court was assured by Mr. Urbach at the Plan confirmation hearing. Mr. Ginn violated his fiduciary duty under the Plan to conserve and protect the assets of the creditors. He viewed his fiduciary capacity in this case as simply a way to appropriate trust funds for himself and his attorney friends at the expense of the creditors.

7. Section 105(a) of Title 11 gives the Court authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]. . . . [And], sua sponte, tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a). With certain exceptions not applicable to the case before the Court,

> [O]n request of a party in interest or the United States trustee . . . the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including – (1) continuing loss to or dimunition of the estate and absence of a reasonable likelihood of rehabilitation. . . .

11 U.S.C. § 1112.

8. Mr. Ginn has breached his fiduciary duty to the creditors in this case by intentionally violating the Plan through his unbridled use of trust funds, and by violation of applicable bankruptcy law and state law as to conduct

of fiduciaries, as set forth above. Mr. Ginn and the attorneys who were paid fees and expenses in violation of the provisions of the Plan must disgorge all receipts pending some later determination by the Court as to entitlement of fees and expenses, if any. The case is now converted to a case under Chapter 7 of the Bankruptcy Code so a bonded trustee, appointed by the Office of the U.S. Trustee, can investigate the facts and seek restitution and recovery of funds and assets as well as bring actions for damages.

9. Any conclusion of law more properly deemed to be a finding of fact is hereby incorporated in this Court's findings of fact. Any finding of fact more properly deemed to be a conclusion of law is hereby incorporated in this Court's conclusions of law.

A separate order has previously been entered consistent with this decision.

Signed this 2nd day of March, 2000.

/s/ Harold C. Abramson
Harold C. Abramson
United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLIED PHYSICIANS GROUP, P.A. AND ALLIED PHYSICIANS OF DFW, INC., Debtor	)))))	CASE NO. 397-312676-HCA-11

ORDER ON SHOW CAUSE HEARING

On or about October 1, 1999 the Court issued a show cause order. The show cause hearing was held on November 8, 1999. Mr. Gregory Ginn, Mr. David Schiller, United Medical Supply Company, and the United States Trustee all appeared and participated in the hearing. Following the hearing the Court announced its order and requested certain separate findings of fact and conclusions of law, which findings and conclusions will be signed by the Court separately. Based on the evidence presented, the arguments of counsel, and the pleadings on file, it is

ORDERED THAT the Plan Agent, as defined in the confirmed Plan of Reorganization, and Mr. Gregory Ginn are enjoined from making any payments unless otherwise ordered by the Court. It is

FURTHER ORDERED THAT, except for filing Applications for Payment in this Court, all attorneys representing the Plan Agent are enjoined from taking any further acts on behalf of the Plan Agent without further order of this court. It is

FURTHER ORDERED THAT Mr. Gregory Ginn [individually and as /s/ H.A.] the Plan Agent, and all other professionals [are directed to /s/ H.A.] disgorge payments received from the Plan Agent before or after confirmation for anything unless such payments were approved by order of this Court, with such disgorged payments to be paid to the registry of this Court on or before forty-two (42) days from November 8, 1999. It is

FURTHER ORDERED THAT, this case is immediately converted to a case under Chapter 7 of the United States Bankruptcy Code and that any Chapter 7 Trustee shall seek restoration of this Estate to the maximum extent possible.

[Further Ordered the U.S. Trustee shall make an audit of the Plan Agent bank accounts and all records of receipts and transactions. /s/ H.A.]

SIGNED 11/17 1999

/s/ H.C. Abramson
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	CASE NO:
	§	97-31267-HCA-11
Allied Physicians Group, P.A.	§	
	§	CASE NO:
	§	97-32616-HCA-11
Allied Physicians of DFW, Inc.	§	
	§	Jointly Administered
	§	Under CASE NO:
Debtors.	§	97-31267-HCA-11
	§	
	§	Chapter 11
	§	
	§	Hearing:
	§	November 8, 1999
	§	9:15 a.m.

Order to Show Cause

Came on for consideration, the United States Trustee's Motion for Order to Show Cause in the above-referenced chapter 11 case. Subsequent to the filing of the United States Trustee's motion, the Plan Agent, through the Plan Agent's attorney, filed an Accounting and Status Report which causes this Court to issue its Order to Show Cause.

The Court confirmed the debtor's Second Amended Joint Plan of Reorganization and its technical amendments on January 21, 1998. By the terms of the Plan, the effective date was May 15, 1998 (Plan 1.38). The Order Confirming the Plan required every professional asserting a fee claim for services rendered before the effective date to file a fee application and serve it on the United States Trustee, debtor's counsel and the committee's

counsel within one hundred eighty days of the effective date, or be forever barred. The Plan Agent's Accounting and Status Report confirms that the Plan Agent paid several professionals for services rendered before the effective date, without complying with the terms of the Plan and without the necessary notice to interested parties and court approval.

The Plan also set forth a specific procedure for the payment of professionals after the effective date of the Plan. Each professional seeking payment was to serve a written statement of services on the Plan Agent, each member of the Plan Advisory committee ("PAC"), and the Bankruptcy Court. If no one objected, the Plan Agent could pay the professional. None of the professionals who received payment for services from the Plan Agent subsequent to the effective date appears to have complied with the Plan.

The Plan Agent (Plan 1.69), who was to be Gregory Wayne Ginn or his business, Gregory Wayne Ginn, P.C., was also required to submit his own request for payment to the PAC, and the PAC would have fifteen days to review the request and file a written objection (Plan 7.12(b)). It appears that the Plan Agent never complied with the Plan before compensating himself or reimbursing his expenses.

The Plan Agent's Status Report states that the Plan Agent paid himself $101,593.12 for services prior to the effective date and at least $13,081.60 to his business for "rent" prior to effective date. The Plan Agent did not comply with the terms of the Plan and did not obtain a court order authorizing these payments. In addition, the

Status Report states that the Plan Agent paid himself an additional $240,742.07 for services after the effective date, and $11,173.92 to his business for additional rent since the effective date. There is no indication that Plan Agent complied with the Plan before compensating himself or reimbursing his expenses.

The Plan limited the Plan Agent's hourly rate to $160. The Plan Agent was created by the confirmation of the Plan in January 1998. The Plan Agent paid himself for 634.95 hours of work between January 22, 1998 and May 15, 1998, which is approximately 79 work days (Monday through Friday), for an average of 8.03 hours per day. This includes "tax time" around April 15, 1998. This does not appear credible. After the effective date, the Plan Agent paid himself for 1,504.63 hours, apparently without serving the appropriate parties with his request.

There has been only one document filed in this case which concerns post-confirmation fees. On November 10, 1998, David A. Schiller filed a "Notice of Submission of Application to Fee Committee". He averred that the Plan Agent employed him to perform "certain legal services" and submitted invoices. The Certificate of Service states that he served the documents only on the Plan Agent, James Moon and Eric Liepins. This does not comply with the Plan procedure; nevertheless, the Plan Agent paid Mr. Schiller $364,172.00 on November 30, 1998.

The Status Report reflects that the November 30th payment was the ninth time the Plan Agent paid Mr. Schiller in this case, not the first. The Plan Agent paid Mr. Schiller at least four times without the required court order, for a total of $73,000.50, for services rendered prior

to the effective date. The Plan Agent's Status Report states that the Plan Agent paid Mr. Schiller at least $608,420.83 without proper authority.

The Court is concerned that the Plan Agent and Mr. Schiller may share office space, and that Mr. Schiller and Mr. Moon are in partnership together. It appears that the Plan Agent may have employed and paid professionals who would have a conflict of interest. The Plan allows the bankruptcy court to determine the reasonableness of fees *sua sponte*, if necessary (Plan 7.12).

It appears from the Status Report that the Plan Agent has not made any distribution to unsecured creditors, and that the docket reflects that he has delayed a resolution of 401K issues. Had the Plan Agent complied with the Plan prior to paying himself and Mr. Schiller, the Court would have been provided with a status report and been able to take action to prevent abuse. Under the Plan (Plan 7.4), the Plan Agent retains discretion as to when, if ever, he makes a distribution to creditors. However, Plan paragraph 8.1 allows the Bankruptcy Court to order payments to creditors.

It appears to the court that creditors would have been better served by conversion of this case to Chapter 7. The administrative costs of this case post confirmation appear to be around $2,000,000 (two million dollars) without any return to creditors.

The Plan requires the Plan Agent to maintain records for inspection (Plan 7.15).

Therefore, the Court hereby

ORDERS that Gregory Ginn shall appear in the United States Courthouse at 1100 Commerce Street, 14th Floor, Courtroom of the Honorable Harold C. Abramson, in Dallas, Texas on November 8, 1999 at 9:15 a.m. and show cause why he should not be removed as Plan Agent and why he should not be required to disgorge all payments for compensation and expenses in this case. In addition, the Court shall consider whether monetary sanctions against Mr. Ginn are appropriate. Mr. Ginn shall be prepared to respond to the following:

a. Why he did not comply with the terms of the Plan before compensating himself and other professionals;

b. Why he hired David Schiller as the attorney for the Plan Agent considering Mr. Schiller's lack of experience, relationships to James Moon, and the office sharing arrangement the Plan Agent has with Mr. Schiller;

c. Why each and every expense item should be reimbursed to him;

d. How he could expend as many hours as he alleges for Plan administration;

e. Why there has been delay in resolving 401k claims and paying unsecured creditors;

Furthermore, the Court hereby orders the Plan Agent to bring original documentation to support any statement of fact he may make, and, in addition, produce the following documents:

a. The original checks for all disbursements and payments of any kind made by the Plan

Agent or caused to be made by the Plan Agent in this case at any time;

b. Ginn's time records for all time billed to this case;

c. All agreements made between the Plan Agent and any professional;

d. The Plan Agent shall identify, in writing, any professional or firm employed, explain why that particular professional was selected and what other professionals were considered for the employment, and disclose what relationship, if any, the selected professional has or had to the Plan Agent, David Schiller, or any party in interest in this case. The Plan Agent shall be prepared to testify about any business and/or social relationship between himself and any professionals hired or paid in this case;

e. The bill received, or any other document, which caused the Plan Agent to pay each and every professional. This should include all requests for payment submitted to the Plan Agent by any professional, including the information accompanying the request;

f. The statement or certification, whether oral or written, by any professional to the Plan Agent that he or she had complied with the terms of the Plan regarding the payment of fees;

g. Any and all bank statements used by the Plan Agent for any money in this case;

h. Any correspondence between the Plan Agent or David Schiller and the Fee Committee or the Plan Advisory Committee, or

the chapter 11 Unsecured Creditor's Committee, including any invoices from Ginn to any member of the committee, James Moon or David Schiller, whether Ginn provided the services or any entity related to Ginn or his businesses provided the services;

i. All tax returns filed on behalf of either debtor or any Allied Physicians entity post-confirmation.

Furthermore, the Court hereby orders David Schiller to appear and show cause, at the same time and place as above, why he should not be made to disgorge all fees paid to him and why he should not be sanctioned.

In order to insure the future efficient administration of this case, the Court shall consider conversion of this case to Chapter 7 for failure to comply with the Plan and to prevent abuse. All written evidence to be produced, and any witness list, shall be filed and served on the United States Trustee no later than October 27, 1999.

Signed this 1st day of October, 1999.

/s/ Harold C. Abramson
Harold C. Abramson
United States Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NUMBER: 01-10501

IN THE MATTER OF:	)
Allied Physicians Group, P.A., and Allied Physicians of DFW, Inc.,	)
Debtors	)
Gregory Wayne Ginn and Gregory Wayne Ginn P.C.	)
Appellants	)
vs.	)
United Medical Supply, United States Trustee, and Scot Seidel, Chapter 7 trustee	)
Appellees	)

APPELLEE UNITED STATES TRUSTEE'S REPLY TO RESPONSE TO MOTION TO DISMISS APPEAL

William T. Neary
United States Trustee
Mary Frances Durham, TX Bar #00790144
United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 9E123
Dallas, TX 75242 (214) 767-8967, ext. 241

The United States Trustee files this his Response to the "Appellant's Response to United States Trustee's

Motion to Dismiss Appeal" to respond to the Appellant's assertion that the district court order is a final order.

The bankruptcy court disgorged fees pending a fee hearing, and the district court agreed that the bankruptcy court should determine the Appellant's fees. The bankruptcy court's Findings of Fact and Conclusions of Law state that, "Mr. Ginn [the Appellant] . . . must disgorge all receipts pending some later determination by the Court as to entitlement of fees and expenses, if any." (3/3/00 Findings of Fact and Conclusions of Law at pages 15-16.)

The bankruptcy court, and the district court in affirming and remanding the fee determination, contemplated further significant proceedings, that is, the determination of Mr. Ginn's reasonable fee. The fact that Mr. Ginn is not in possession of the money disgorged does not make the district court's order a "final" order. The money rests safely in the registry of the court.

Obviously, funds don't languish in court registries in perpetuity. No one expects that the money will remain forever in the registry because there will be a trial on the reasonableness of Mr. Ginn's fees. Mr. Ginn, in his letter to the State Board of Accountancy dated February 5, 2001, states that the bankruptcy court has set his "matter for a full hearing during the week of June 25, 2001." (Exhibit B to the Appellant's Response, pages 20-21). Therefore, even Mr. Ginn acknowledges that the bankruptcy court is ready, willing and able to hear and determine his fees.

Mr. Ginn raises a constitutional issue. However, there is nothing unconstitutional about securing money in the registry of the court pending a trial. Mr. Ginn has a claim in the case, and the court will determine the amount and

priority of that claim. The trustee cannot administer the case without this determination.

CONCLUSION

For the foregoing reasons, this Court should dismiss Mr. Ginn's appeal, and stay briefing pending the disposition of this motion.

May 11, 2001

William T. Neary
United States Trustee

/s/ Mary Frances Durham
Mary Frances Durham, TX Bar #00790144
United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 9E23
Dallas, TX 75242 (214) 767-8967, ext. 241

Certificate of Service

I hereby certify that I mailed a copy of the foregoing document by first class United States mail, postage prepaid, on May 14, 2001, to the following:

Frank L. Broyles, Goins Underkofler Crawford & Langdon 1601 Elm Street, Suite 330, Dallas, TX 75201

Gerrit M. Pronske, Thompson, Coe, Cousins & Irons, LLP, 200 Crescent Court, 11th Floor, Dallas, TX 75201-1853

Scott Seidel, Chapter 7 Trustee, Passman & Jones, 1201 Elm St., Suite 2500, Dallas, TX 75270

Anthony Petrocchi/Christopher Weil/ Jeffery W. Hellberg, Weil & Petrocchi, PC, 1601 Elm St., #1900, LB100, Dallas, TX 75201

/s/ Mary Frances Durham
Mary Frances Durham

NO. 01-10501

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREGORY W. GINN and
GREGORY WAYNE GINN, P.C.,

Appellants,

v.

UNITED MEDICAL SUPPLY COMPANY,
INC., UNITED STATES TRUSTEE, and
SCOTT SEIDEL, CHAPTER 7 TRUSTEE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

APPELLANTS' RESPONSE TO UNITED STATES TRUSTEE'S MOTION TO DISMISS APPEAL

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ATTORNEYS FOR APPELLANTS

May 9, 2001

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 28.2.1, the undersigned counsel certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

APPELLANTS:	Gregory W. Ginn Gregory Wayne Ginn, P.C.,
COUNSEL:	Christopher M. Weil Anthony A. Petrocchi Jeffrey Hellberg Weil & Petrocchi, P.C.
APPELLEE:	Office of the U.S. Trustee
COUNSEL:	Mary Frances Durham Office of the U.S. Trustee
APPELLEE:	United Medical Supply Company, Inc.
COUNSEL:	Frank Broyles Goins Underkofler Crawford & Langdon
PLAINTIFF-APPELLEE:	Scott Seidel, Chapter 7 Trustee
COUNSEL:	Gerrit M. Pronske Thompson, Coe, Cousins & Irons, L.L.P.

Anthony A. Petrocchi

NO. 01-10501

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREGORY W. GINN and
GREGORY WAYNE GINN, P.C.,

Appellants,

v.

UNITED MEDICAL SUPPLY COMPANY,
INC., UNITED STATES TRUSTEE, and
SCOTT SEIDEL, CHAPTER 7 TRUSTEE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

APPELLANTS' RESPONSE TO UNITED STATES TRUSTEE'S MOTION TO DISMISS APPEAL

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT:

GREGORY W. GINN ("Ginn") and GREGORY WAYNE GINN, P.C. ("GinnPC;" collectively, "Appellants"), Appellants in the above-styled and numbered appellate proceeding, file this their Response to the United States Trustee's Motion to Dismiss Appeal for Lack of Finality and for Stay of Briefing Schedule, and for same would show this Court as follows:

1. This response is filed subject to and with deference to the automatic stay in place in connection with the

bankruptcy proceeding initiated by Appellee United Medical Supply Company, Inc. in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, under cause no. 01-41911-BJH-11, styled *In re United Medical Supply Company, Inc.*, as set forth in the Suggestion of Bankruptcy previously filed herein by Appellants.

2. Appellee U.S. Trustee seeks dismissal of this appellate proceeding, contending that the underlying order of the Bankruptcy Court appealed from herein is not final, the proceedings having been remanded back to that Bankruptcy Court by the District Court. The District Court filed no memorandum opinion in support of its Order of January 16, 2001, which Order states in relevant part:

> The Court separates the remaining appeal by Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. ("Ginn"), formerly Civil Case No. 3:00-CV-1549-X. With respect to Ginn's appeal of the Bankruptcy Court's Show Cause Order, entered November 22, 1999, that Order is **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. With respect to Ginn's appeal of the Bankruptcy Court's Findings of Fact and Conclusions of Law, entered March 3, 2000, those findings and conclusions, are **AFFIRMED** for substantially the same reasons the Court stated at the hearing this morning. The Bankruptcy Court's Findings were always subject to "some later determination by the Court as to entitlement of fees and expenses, if any." Findings of Fact and Conclusions of Law, at 15-16, ¶8. The Court's ruling today does not preclude Judge Abramson from modifying

> or vacating his Findings of Fact and Conclusions of Law as needed to effectuate a fair and prompt distribution of the disgorged funds, and to comply with the requirements of procedural due process. The Court **REMANDS** the case for further proceedings not inconsistent with this opinion.

Order, January 16, 2001, p. 2 (emphasis in original). A copy of that Order is attached as Exhibit A for the Court's reference.

The District Court's Order Requires No or Only Ministerial Action By the Bankruptcy Court

3. The U.S. Trustee relies upon the case of *Beal Bank, S.S.B. v. Caddo Parish-Villas South, Ltd. (In The Matter of Caddo Parish-Villas South, Ltd.)*, 174 F.3d 624 (5th Cir. 1999), for the proposition that:

> A long, unbroken line of cases establishes the general rule in this circuit that a district court order is not a final order under section 158(d) where that order reverses an order of the bankruptcy court and remands the case to the bankruptcy court for significant further proceedings.

Id., 174 F.3d at 626 (emphasis added). The U.S. Trustee further cites in support of his argument the cases of *Aegis Specialty Mktg. Inc. v. Ferlita (In the Matter of Aegis Specialty Marketing Inc. of Alabama)*, 68 F.3d 919 (5th Cir. 1995), and *Allegheny International Credit Corporation v. Bowman (In re Bowman)*, 821 F.2d 245 (5th Cir. 1987), both of which also involve the case-by-case evaluation of finality of orders reversed by a United States District Court

and then remanded to a Bankruptcy Court for what were determined to be "significant further proceedings."

4. In a footnote in its Motion to Dismiss, the U.S. Trustee acknowledges that his citations involved only cases in which this Circuit is reviewing an order reversing the Bankruptcy Court, but argues that the affirmance of the Bankruptcy Court's order in this case should not effect application of the concept of finality expressed in *Caddo Parish-Villas South, Ltd.*, for which proposition the U.S. Trustee cites no authority. One reason the subject January 16, 2001 Order of the District Court below should be determined to be final is that the operative language of that Order does not *require* the Bankruptcy Court *to do anything*. Although the District Court made clear that it did not "***preclude*** Judge Abramson from modifying or vacating his Findings of Fact and Conclusions of Law" (emphasis added), the District Court did not require that the Bankruptcy Court even review those findings and conclusions on remand. When a District Court's remand order "neither necessitates further fact-finding nor the use of substantial discretion on the part of the bankruptcy court," the subject order is final and appealable. *Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro Snax)*, 157 F.3d 414, 420-21 (5th Cir. 1998).

5. In effect, because there is no requirement or necessity for the Bankruptcy Court to review, modify, or withdraw its findings of fact and conclusions of law imposed by the District Court, a remand in which erroneous findings that Appellants breached a fiduciary duty and were grossly negligent remain in place, the result with be the ministerial act of the entry of a "no fee" decision, if any hearing on a fee application is ever held.

Under this Circuit's analysis, "where a district court's remand entails significant further proceedings, such as additional fact-finding, then the order should not be considered final. ***However, if the remand involves only ministerial proceedings, such as the entry of an order by the bankruptcy court in accordance with the district court's decision, then the order should be considered final.***" *Caddo Parish-Villas South, Ltd.*, 174 F.3d at 628, citing *Aegis Specialty Marketing Inc.*, 68 F.3d at 921 (emphasis added). Because the findings and conclusions of the Bankruptcy Court were affirmed by the District Court, and those findings and conclusions, if not withdraw, are likely dispositive of matters raised in any fee application by Appellants, this matter is final and appealable under 28 U.S.C.A. §158(d).

The District Court's Denial of Appellants' Jurisdictional Challenges Are Final

6. Another, and perhaps more obvious reason, why the Bankruptcy Court and District Court's respective orders should be determined to be final and appealable under 28 U.S.C.A. §158(d), can be found from an examination of the points of error raised by on appeal. In addition to and certainly no less important than the points of error challenging the Bankruptcy Court's findings and conclusions, Appellants included the following points of error in their Brief of Appellants filed with the District Court:

I. THE BANKRUPTCY COURT VIOLATED THE CONSTITUTIONAL DUE PROCESS RIGHTS OF APPELLANTS BY ORDERING THAT APPELLANTS BE ENJOINED FROM ACTING AS THE

PLAN AGENT AND DISGORGE ALL AMOUNTS PAID WITHOUT FIRST PROVIDING A FULL AND FAIR OPPORTUNITY FOR HEARING.

II. THE BANKRUPTCY COURT COMMITTED REVERSIBLE ERROR IN ORDERING APPELLANTS BE ENJOINED FROM ACTING AS PLAN AGENT AND DISGORGE ALL AMOUNTS PAID WITHOUT FIRST PROVIDING A FULL AND FAIR OPPORTUNITY FOR HEARING.

III. THE BANKRUPTCY COURT EXCEEDED ITS AUTHORITY AND JURISDICTION IN ATTEMPTING TO RELY UPON 11 U.S.C. §105 TO REGULATE, MODIFY OR UNILATERALLY AMEND FEE AGREEMENTS BETWEEN THE PLAN AGENT AND PROFESSIONALS OR TO ORDER DISGORGEMENT OF THE PLAN AGENT'S COMPENSATION.

and identified the following issues, among others, in their Designation of Issues on Appeal filed with this Court:

2. Did the United States District Court commit error and/or violate the Ginn Appellants' constitutional rights when it affirmed the Bankruptcy Court's removal of the Ginn Appellants as the Plan Agent without providing those Appellants with a full and fair hearing?

3. Did the United States District Court commit error when it affirmed the Bankruptcy Court's refusing the Ginn Appellants the right to cross examine and present witnesses and/or to present evidence in response to the Order to Show Cause?

5. Did the United States District Court commit error when it failed to find that the Bankruptcy

Court exceeded its authority in using section 105 of the Bankruptcy Code to regulate a fee agreements between the Plan Agent and professionals who were not retained under one of the provisions of the Bankruptcy Code governing the hiring of professional persons by a debtor in possession or a trustee?

7. Did the United States District Court commit error when it determined that the Bankruptcy Court had jurisdiction and authority to issue the ruling set forth in the Show Cause Order under either 11 U.S.C. §105 or §1112?

10. Did the United States District Court commit error when it affirmed the Bankruptcy Court's requiring the Ginn Appellants to seek recovery of disgorged fees and expenses and payment of outstanding fees and expenses in the Converted Chapter 7 proceeding when not acting for a party in the converted case?

12. Did the United State [sic] District Court, after properly removing the bankruptcy reference and requiring the filing of a fee application by the Ginn Appellants and others, commit error by putting the reference back in place prior to conducting a hearing on the Ginn Appellants' fee application?

7. Certainly the District Court's denial of Appellants' challenge to the Bankruptcy Court's jurisdiction to act at all with respect to the material issues (Point of Error No. III; designated issue nos. 5 and 7) is final and will not be reconsidered or otherwise effected [sic] in any way by any proceedings upon "remand." Similarly, a challenge to the Bankruptcy Court's right to remove and enjoin Appellants' from acting as Plan Agent without compliance with Constitutional due process protections (Point of Error Nos. I and II; designated issue nos. 2 and

3) is beyond the scope of any purported "remand," particularly under a "remand" that actually requires no action at all from the Bankruptcy Court. Even if the Bankruptcy Court conducts a hearing regarding the reasonableness of Appellants' fees, that hearing would be carried on without resolving or addressing the jurisdictional argument of Appellants and would be contrary to Appellants' assertion that no such jurisdiction lies with the Bankruptcy Court. In other words, even if the District Court remanded this proceeding to the Bankruptcy Court and required a hearing to reconsider the unsupported findings and conclusions and to make a determination as to the reasonableness of Appellants' fees (which express remand the District Court did not make), such remand would not be a directive requiring "significant further proceedings" in the Bankruptcy Court with respect to the other material appellate points raised by Appellants' before this Court and discussed herein. Accordingly, the orders which are the subject of this proceeding are final and properly appealable under 28 U.S.C.A. § 158(d).

THE MOVANT (AND BANKRUPTCY COURT) TAKES INCONSISTENT POSITIONS ON FINALITY IN DIFFERENT FORUMS

8. Finally, but not without material significance, the argument of the U.S. Trustee that this appeal distracts the parties from "the focus on the real issue in dispute the propriety of Mr. Ginn's fee request," and that the appeal "is not profitable" for the parties, belies that fact that the Bankruptcy Court and the office of the U.S. Trustee have presented the March 3, 2000 Findings and Conclusions in other matters as though they are final.

9. At a hearing before the District Court on November 27, 2001, the following exchange took place between the District Court and an attorney for the U.S. Trustee:

THE COURT: So you do think they're crooks and they're committing fraud. Is that what you're saying?

MS. DURHAM: My personal view?

THE COURT: Yeah. Well, you're the one standing there.

MS. DURHAM: It's that, yeah, there's – that they're self-dealing, yes –

THE COURT: Okay.

MS. DURHAM: – I do. And, in fact, ***the State Board of Accountancy has notified Mr. Ginn they intend to take his CPA license away.*** So there's some seriousness – it's a very serious matter and it's –

THE COURT: Okay.

MS. DURHAM: – not over yet.

Hearing Transcript of November 27, 2000, p. 63, lines 6-19 (emphasis added).[1] Ironically, what the attorney for the U.S. Trustee failed to add to this inflammatory statement (in addition to the fact that no hearing has been held nor any determination made in those proceedings) is that Judge Harold Abramson, the judge of the Bankruptcy

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[1] The 11/27/00 transcript has been designated for inclusion in the record on appeal, although at this time Appellants do not know the specific volume number assigned to same to make a more definite citation thereto in this Response.

Court from whose order appeal is sought herein, is the one who filed the complaint, sending the March 3, 2000 Findings and Conclusions to the Texas State Board of Accountancy shortly after entry of same.[2] A copy of Judge Abramson's letter initiating that matter is attached hereto as Exhibit B. The Texas State Board of Accountancy plans to rely upon only those March 3, 2001 Findings and Conclusions to support the complaint filed by Judge Abramson against Appellants.[3]

10. If the Bankruptcy Court intended to conduct a full, fair, and impartial hearing on the reasonableness of Appellants' fees in the future (as opposed to the entry of an order supported by its previous "preliminary" findings and conclusions), such intent does not square with the Bankruptcy Court's conduct in this other forum. The problem Appellants now face is that the "remand" of the District Court *requires* the Bankruptcy Court to do absolutely nothing at all. Because the District Court's Order does not contain any express or specific requirements of

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[2] In response to Appellants' Interrogatories (attached as Exhibit C), the Enforcement Division of the Texas State Board of Public Accountancy (attached as Exhibit D) identified Judge Abramson as the person filing the complaint (Response to Interrogatory No. 2) and Mary Frances Durham of the office of the U.S. Trustee as the Judge's agent in those proceedings (Response to Interrogatory No. 21).

[3] *See*, Responses to Interrogatory Nos. 4, 5, and 6 regarding the Texas State Board of Accountancy not relying upon fact or expert witnesses, and Responses to Interrogatory Nos. 9 and 12-19, and particularly No. 9, evidencing the State Board's intent to rely solely on the Bankruptcy Court's findings and conclusions.

any, let alone significant, proceedings for remand, the subject Orders are final for purposes of appeal.

10. In light of the matters addressed above, one might inquiry as to the Bankruptcy Court's purpose for entering findings and conclusions months after the subject Order was appealed to the United States District Court. It is a general and well established rule that the taking of an appeal transfers jurisdiction from the Bankruptcy Court to the District Court with regard to any matters involved in the appeal and divests the Bankruptcy Court of jurisdiction to proceed further with such matters. *Midwest Properties No. Two v. Big Hill Investment Co., Inc.*, 93 B.R. 357, 360 (N.D.Tex. 1988), *citing Ingersoll-Rand Financial Corp. v. Kendrick Equipment Corp. (In re Kendrick Equipment Corp.)*, 60 B.R. 356 (Bankr. W.D.Va.1986). *See also, In re Combined Metals Reduction Company*, 557 F.2d 179 (9th Cir.1977); *In re Bialac*, 15 B.R. 901 (Bankr. 9th Cir.1981), *aff'd*, 694 F.2d 625 (9th Cir.1982); *In re Excavation Construction, Inc.*, 8 B.R. 752 (D.Md.1981); *In re Urban Development Ltd, Inc.*, 42 B.R. 741 (Bankr.M.D.Fla.1984); *In re Hardy*, 30 B.R. 109 (Bankr. S.D.Ohio 1983). Under FED.R.CIV.P. 52(b), the Bankruptcy Court ceased to have jurisdiction to issue findings of fact or conclusions of law ten days after it issued the Disgorgement Order. *Midwest Properties No. Two v. Big Hill Investment Co., Inc.*, 93 B.R. at 360, *citing In re Texas Extrusion Corp.*, 836 F.2d 217, 220-21 (5th Cir.1988) ("[t]his 10 day period of Rule 52(b) is jurisdictional and cannot be extended in the discretion of the court."), *citing Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir.1980). And yet, notwithstanding the authorities and legal principals set forth above, the Bankruptcy Court used such findings and

conclusions entered during a time it had no such jurisdiction to support a claim against Appellants in another forum.

11. Perhaps a more pressing question to ask is: if these March 3, 2000 Findings of Fact and Conclusions of Law are only preliminary and were made in anticipation of a full, fair, and impartial hearing on the issue of reasonableness of Appellants' fees as asserted by the U.S. Trustee, why would the judge of a United States Bankruptcy Court, putatively "represented" by the U.S. Trustee's office, an adverse party in active proceedings before that same Court,[4] present a contemporaneous complaint in a different forum supported by and under the pretense, if not express representation, that the findings and conclusions were final? It is clear that when not raised as a purported basis for a request for dismissal, the Bankruptcy Court and the U.S. Trustee consider those findings and conclusions final and binding, which will require no further review "on remand." The inconsistent arguments to the contrary now being made by the U.S. Trustee are not credible and should be discounted and rejected by this Court.

Conclusion

12. For each of the foregoing reasons, as supported by the authorities cited herein and based upon the exhibits attached hereto, this Court should find that the January 16, 2001 Order of the District Court which affirms the November 22, 1999 Order and March 3, 2000

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[4] *See supra*, n.2 and Exhibit B.

Findings of Fact and Conclusions of Law of the Bankruptcy Court, is final and appeal under the requirements of 28 U.S.C.A. § 158(d). Appellants do not oppose the stay of briefing during the pendency of the Court's consideration of this Motion as requested by the U.S. Trustee, and believe that the briefing stay also should remain in place (along with consideration of the motion to dismiss) until the issue of the automatic stay imposed by the bankruptcy filing of United Medical Supply Co., Inc. has been addressed and resolved.

WHEREFORE, Appellants Gregory Wayne Ginn and Gregory Wayne Ginn, P.C. prays that the Court deny in all things the Appellee's Motion to Dismiss Appeal for Lack of Finality, and for such other and further relief, in law and in equity, to which they may be entitled.

Respectfully submitted,

/s/ Christopher M. Weil
Texas State Bar No. 21079000
Anthony A. Petrocchi
Texas Bar No. 15851700
Jeffrey W. Hellberg, Jr.
Texas State Bar No. 00796738

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ATTORNEYS FOR APPELLANT
GREGORY W. GINN AND
GREGORY WAYNE GINN, P.C.

[Certificate Of Service Omitted]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NUMBER: 01-10501

IN THE MATTER OF:	)
Allied Physicians Group, P.A., and Allied Physicians of DFW, Inc.,	)
Debtors	)
Gregory Wayne Ginn and Gregory Wayne Ginn P.C.	)
Appellants	)
vs.	)
United Medical Supply, United States Trustee, and Scott Seidel, Chapter 7 trustee	)
Appellees	)

APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF FINALITY AND FOR STAY OF BRIEFING SCHEDULE

William T. Neary
United States Trustee
Mary Frances Durham, TXB #00790144
United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 9E23
Dallas, TX 75242
(214) 767-8967, ext. 241

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NUMBER: 01-10501

IN THE MATTER OF:	)
Allied Physicians Group, P.A., and Allied Physicians of DFW, Inc.,	)
Debtors	)
Gregory Wayne Ginn and Gregory Wayne Ginn P.C.	)
Appellants	)
vs.	)
United Medical Supply, United States Trustee Scott Seidel, Chapter 7 trustee	)
Appellees	)

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Christopher Weil, Jeffery Hellberg, and
Anthony Petrocchi (opposing counsel)
Gregory Ginn, the Appellant
Scott Seidel, as chapter 7 trustee for Allied Physicians

All creditors who filed proofs of claim in either or both of the two just listed bankruptcy cases, listed on the Attachment – Tracor service certification for its mailing of the court's Order to Show Cause

Date: April 27, 2001

William T. Neary
United States Trustee
/s/ Mary Frances Durham
Mary Frances Durham,
TX Bar No. 00790144
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I. INTRODUCTION

After a trial in the bankruptcy court on an Order to Show Cause why he should not be removed from the case and ordered to disgorge all fees, Gregory Ginn appealed the resulting order removing him and disgorging his fees pending a fee hearing. The district court set the appeal for oral argument, but at the time set for the argument, determined that it would withdraw the reference. The district court modified this order to limit the withdrawal of the reference to fees, and further limited its order to determine only the reasonable fees of the four appellants to the bankruptcy court order resulting from the Show Cause Hearing.[1]

Thereafter, the district court decided not to conduct a trial on the question of the reasonableness of Mr. Ginn's fee, and "refer[red]" that process to the bankruptcy court and affirmed the bankruptcy court's order resulting from

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[1] Three attorneys also appealed the order disgorging fees, but have settled their appeal by an order determining a reasonable amount of fees for each.

the Show Cause Hearing. (Distr. Ct. Dkt. #107) Mr. Ginn did not file an application for fees in the bankruptcy court subsequent to the referral; instead, he filed this appeal to the Fifth Circuit.

II. PERTINENT FACTS AND PROCEEDINGS BELOW

Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. filed voluntary chapter 11 petitions on February 10, 1997, and March 25, 1997, respectively, and had no operations at the time of filing. Allied Physicians Group, P.A. was owned by a group of medical doctors. The primary asset of Allied Physicians Group, P.A. was 100% of the stock of Allied Physicians of DFW, Inc., whose business was to collect accounts receivable for the physicians and pay salaries, benefits, vendors, and office expenses. The cases were jointly administered prior to confirmation, and the Order Confirming the Plan directed substantive consolidation of the cases.

The Plan, which was confirmed at a hearing on December 31, 1997, provided for the appointment of a Plan Agent (Mr. Ginn) to reduce all assets to money and make distributions to creditors. (Plan at Bankr. Dkt. #246; Order confirming at Bankr. Dkt. #268) This case was a liquidating case, and there never was a "reorganized debtor." As the Plan Agent, Mr. Ginn had control over the creditors' money until he disbursed it to them. Pursuant to Mr. Ginn's requests and the authority granted to it by the Confirmed Plan and Bankruptcy Code, the bankruptcy court continued to hear and determine a multitude of adversary proceedings. The court never entered a final decree in the case or otherwise closed the case.

In September 1999, pursuant to the bankruptcy court's request, Mr. Ginn filed a Status Report which detailed income and disbursements. (Bankr. Dkt. #459) Based upon information disclosed in the Status Report, the bankruptcy court determined that Mr. Ginn had reduced some assets to money, but paid this money, without complying with the terms of the Plan, to himself and his attorneys, but not to creditors. (Bankr. Dkt. #463, the Order to Show Cause) This fact is not controverted, but the group of professionals he paid asserted excuses[2] for ignoring the Plan provisions regarding payment of professional fees.

The United States Trustee filed a Motion to Show Cause and served that Motion on Mr. Ginn, on September 20, 1999. (Bankr. Dkt. #458) The bankruptcy court issued its Show Cause Order on October 1, 1999, for a Show Cause hearing to be held on November 8, 1999. (Bankr. Dkt. #463) After considering Mr. Ginn's testimony and evidence, the bankruptcy court issued a bench ruling removing Mr. Ginn and disgorging all improperly paid fees pending fee hearings, and memorialized that ruling in its order entered November 22, 1999. (Bankr. Dkt. #497) The court entered its Findings of Fact and Conclusions of Law on March 3, 2000. (Bankr. Dkt. #557) Mr. Ginn appealed to the district court.

Eventually, the district court affirmed the bankruptcy court and referred the determination of Mr. Ginn's reasonable fee to the bankruptcy court. (Bankr. Dkt. #107,

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[2] The professionals asserted that they either did not know about the terms of the plan or that they thought Mr. Ginn was "taking care of everything" for them.

dated 1/12/01) Mr. Ginn timely appealed that order to this Circuit.

III. GROUNDS FOR MOTION TO DISMISS AND STAY OF BRIEFING SCHEDULE

A. UNDER THIS COURT'S PRECEDENTS, THE JUDGEMENT OF THE DISTRICT COURT REMANDING TO THE BANKRUPTCY COURT FOR FURTHER PROCEEDINGS IN [sic] NOT A FINAL ORDER, AND THEREFORE, NOT AN APPEALABLE ORDER.

This Court has jurisdiction to review appeals from final decisions, orders and decrees under 28 U.S.C. § 158(d). "A long, unbroken line of cases establishes the general rule in this circuit that a district court order is not a final order under section 158(d) where that order reverses an order of the bankruptcy court and remands the case to the bankruptcy court for significant further proceedings." *In the Matter of Caddo Parish-Villas South, Ltd.*, 174 F.3d 56, 58. (5th Cir. 1999).

Such is the case here. The remand in this case requires "significant further proceedings" on the part of the bankruptcy court – it must determine whether Mr. Ginn's fees are reasonable. This appeal will become irrelevant if Mr. Ginn wins on this issue on remand. The district court merely affirmed the bankruptcy court's order that Mr. Ginn disgorge fees *pending* that fee review. That affirmance becomes irrelevant if Mr. Ginn prevails

below because disgorged funds will be returned to him.[3] Such an inherently interlocutory disgorgement order lacks finality, and Mr. Ginn's appeal of it should be dismissed.

In addition, dismissal will enable the parties to focus on the real issue in dispute – the propriety of Mr. Ginn's fee request. On remand Mr. Ginn will need to file a fee request[4] and send notice to appropriate parties. At that point, the bankruptcy court will entertain evidence and award appropriate fees, if any. Given that none of these important tasks have occurred, it is not profitable to the parties, or this Court, to press forward with the appeal at this juncture.

This Court's jurisprudence supports the conclusion that Mr. Ginn's appeal is non-final. In *Caddo Parish-Villas*, this court followed its prior decision in *In re Bowman*, 821 F.2d 245 (5th Cir. 1987) in holding that the "crucial question" for jurisdictional purposes is whether the remand requires significant further proceedings. *Caddo Parish-Villas* at p. 627. Here, it does. The bankruptcy court must conduct an evidentiary hearing to determine Mr. Ginn's reasonable fee, which is the principal issue in dispute in this case. "[W]hen a district court sitting as a court of appeals in bankruptcy remands a case to the bankruptcy court for significant further proceedings, the remand

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[3] The funds are currently are [sic] in the registry of the court.

[4] Mr. Ginn filed a fee request with the district court in preparation for the scheduled trial on the issue in January 2001; however, he has not filed an application for fees in the bankruptcy court.

order is not 'final' and therefore, not appealable under § 158(d)."[5] *Caddo Parish-Villas* at 59 (quoting *Matter of Aegis Specialty Marketing Inc. of Alabama*, 68 F.3d 919 (5th Cir. 1995)). Because that is the case here, Mr. Ginn's appeal lacks finality and should be dismissed.

B. THE COURT SHOULD STAY BRIEFING IN THIS CASE PENDING DISPOSITION OF THIS MOTION TO DISMISS.

If the Court grants the motion to dismiss, there would be no reason for the parties to address the merits of the appeal. This Court's precedents demonstrate that this appeal lacks a final order and, therefore, this Court lacks subject matter jurisdiction over the appeal. A stay of briefing in the case pending disposition of this motion would promote judicial efficiency and save resources.

---

[5] Although *Caddo Parish-Villas South* involved a remand arising from the reversal of a bankruptcy court's decision, its rationale applies with equal force to cases like this one, where the remand arises from an affirmance that merely clears the way for the bankruptcy court to decide the principal issue in dispute between the parties. Such an affirmance is particularly non-final when, as here, the resolution of that principal issue on remand may wholly negate the effect of the affirmance.

CONCLUSION

For the foregoing reasons, this Court should dismiss Mr. Ginn's appeal, and stay briefing pending the disposition of this motion.

April 27, 2001

William T. Neary
United States Trustee

/s/ Mary Frances Durham
Mary Frances Durham, TXB #00790144
United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 9E23
Dallas, TX 75242
(212) 767-8967, ext. 241

Certificate of Conference

I hereby certify that I called Anthony Petrocchi to confer with him about his position regarding the motion to dismiss. I was not able to speak to Mr. Petrocchi, and would conclude that he opposes the motion to dismiss.

/s/ Mary Frances Durham
Mary Frances Durham

[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SCHILLER, PLLC and DAVID SCHILLER, et al.,	§	
Appellants	§	CIVIL CASE NO. 3:00-CV-616-X
v.	§	
UNITED MEDICAL SUPPLY, et al.,	§	
Appellees.	§	

APPELLANTS GREGORY W. GINN AND GREGORY WAYNE GINN, P.C.'S DESIGNATION OF ITEMS FOR THE RECORD AND STATEMENT OF ISSUES ON APPEAL

GREGORY W. GINN and GREGORY WAYNE GINN, P.C. (collectively the "Ginn Appellants"), Appellants in connection with the appeal from this Court's Order entered on January 16, 2001 ("the Order"), denying the Ginn Appellants' appeal from the Order on the Show Cause Hearing, signed November 17, 1999, and entered November 22, 1999, by the Bankruptcy Court below, file this their Designation of Items for the Record and Statement of Issues on Appeal made pursuant to FED.R.APP.P. 6(b)(2)(B), and in support thereof would show the court as follows:

Pursuant to FED.R.APP.P. 6(b)(2)(B), the Ginn Appellants submit this designation of items to be included in the appellate record and statement of issues on appeal.

Issues on Appeal

The Ginn Appellants seek to present and obtain determination on each of the following issues on appeal:

1. Did the United States District Court commit error and/or violate the Ginn Appellants' constitutional rights when it affirmed the Bankruptcy Court's order requiring the Ginn Appellants to disgorge all fees they had been paid while barring those Appellants from presenting evidence and/or testimony of the independent allowance and reasonableness of those fees?

2. Did the United States District Court commit error and/or violate the Ginn Appellants' constitutional rights when it affirmed the Bankruptcy Court's removal of the Ginn Appellants as the Plan Agent without providing those Appellants with a full and fair hearing?

3. Did the United States District commit error when it affirmed the Bankruptcy Court's refusing the Ginn Appellants the right to cross examine and present witnesses and/or to present evidence in response to the Order to Show Cause?

4. Did the United States District Court commit error when it affirmed the Bankruptcy Court's findings regarding the Ginn Appellants' conduct, particularly but without limitation those findings relating to (a) professionals' deceiving or misrepresenting facts to the Court; (b) the value of insurance claims settled previously under approval and order of the same Court; (c) Appellants' review of professionals' time prior to payment; (d) the financial status of the amounts available to the estates at the time of the Plan Agent's appointment and the time of

the hearing; (e) any purported breaches of fiduciary duty; and (f) any purported gross neglect??

5. Did the United States District court commit error when it failed to find that the Bankruptcy Court exceeded its authority in using section 105 of the Bankruptcy Code to regulate a fee agreements between the Plan Agent and professionals who were not retained under one of the provisions of the Bankruptcy Code governing the hiring of professional persons by a debtor in possession or a trustee?

6. Did the United States District Court commit error when it affirmed Bankruptcy Court's finding that James Moon and Eric Liepens did nothing with respect to the review of professionals' invoices and that they had no authority under the Plan of Reorganization, without evidence, or sufficient evidence?

7. Did the United States District Court commit error when it determined that the Bankruptcy Court had jurisdiction and authority to issue the ruling set forth in the Show Cause Order under either 11 U.S.C. §105 or §1112?

8. Did the United States District court commit error when it affirmed the finding of the Bankruptcy Court that the Ginn Appellants, or either of them, violated any provision of the Plan of Reorganization?

9. Did the United States District Court commit error when it affirmed the Bankruptcy Court's conversion of the bankruptcy proceeding below from a Chapter 11 to a Chapter 7 case?

10. Did the United States District Court commit error when it affirmed the Bankruptcy Court's requiring

the Ginn Appellants to seek recovery of disgorged fees and expenses and payment of outstanding fees and expenses in the Converted Chapter 7 proceeding when not acting for a party in the converted case?

11. Did the United States District Court commit error when it failed to find that the Bankruptcy Court should have precluded UMSC's presentation of evidence and argument in response to timely objection, in favor of the entry of an order requiring appellants and professionals engaged by the Plan Agent to disgorge fees when the uncontroverted evidence demonstrates that prior to the November 8, 1999 hearing, UMSC had, through its counsel, reviewed and approved in writing all fees paid to professionals?

12. Did the United States District Court, after properly removing the bankruptcy reference and requiring the filing of a fee application by the Ginn Appellants and others, commit error by putting the reference back in place prior to conducting a hearing on the Ginn Appellants' fee application?

13. Did the District Court commit error by failing to reverse or set aside the Bankruptcy Court's erroneous findings of fact and conclusions of law, while purporting to remand the matter back to the Bankruptcy Court without providing any requirement for revision or review of the subject findings and conclusions or any specific directive to the Bankruptcy Court?

* * *

Christopher M. Weil
Texas State Bar No. 21079000
Jeffrey W. Hellberg, Jr.
Texas State Bar No. 00796738
WEIL & PETROCCHI, P.C.
1601 Elm Street, L.B. 100
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Dallas, Texas 75201
(214) 969-7272 (office)
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
	)	
ALLIED PHYSICIANS GROUP, P.A., and ALLIED PHYSICIANS OF DFW, INC.,	)	CASE NO. 397-31267-HCA-7
	)	
	)	
Debtors.	)	

APPELLANTS GREGORY W. GINN AND GREGORY WAYNE GINN, P.C.'S DESIGNATION OF ADDITIONAL ITEMS FOR THE RECORD AND STATEMENT OF ISSUES ON APPEAL

(Filed Dec. 20, 1999)

GREGORY W. GINN and GREGORY WAYNE GINN, P.C. (collectively, "Appellants"), Appellants in connection with the appeal from this Court's November 22, 1999 Order on Show Cause Hearing entered in the above-styled and numbered cause, file this Designation of Additional Items for the Record and Statement of Issues on Appeal made pursuant to Federal Rule of Bankruptcy

Procedure 8006, and in support thereof would show the Court as follows:

Pursuant to Federal Rule of Bankruptcy Procedure 8006, Appellants Ginn and Ginn, P.C. submit this designation of additional items to be included in the appellate record and statement of issues on appeal in supplement to and incorporating by reference those designations made previously by Appellants David A. Schiller, David A. Schiller, P.L.L.C.

Issues on Appeal

Appellants seek to present and obtain determination on each of the following issues on appeal:

1. Did the Bankruptcy Court commit reversible error in ordering Appellants to disgorge all fees they had been paid while barring Appellants from presenting evidence of the independent allowance and reasonableness of those fees?

2. Did the Bankruptcy Court commit reversible error by refusing Appellants the right to cross examine and present witnesses and to present evidence in response to the Order to Show Cause?

3. Did the Bankruptcy Court make findings regarding Appellants' conduct that were clearly erroneous, particularly but without limitation those findings relating to (a) professionals' "snookering" the Court; (b) the value of insurance claims settled previously under approval and order of the same Court; (c) Appellants' review of professionals' time prior to payment; (d) the financial status of the amounts available to the estates at the time of the

Plan Agent's appointment and the time of the hearing; (e) any purported breaches of fiduciary duty; and (f) any purported gross neglect?

4. Did the bankruptcy court exceed its authority in using section 105 of the Bankruptcy Code to regulate a fee agreements [sic] between the Plan Agent and professionals who were not retained under one of the provisions of the Bankruptcy Code governing the hiring of professional persons by a debtor in possession or a trustee?

5. Did the Bankruptcy Court commit reversible error when it found that James Moon and Eric Liepens did nothing with respect to the review of professionals' invoices and that they had no authority under the Plan of Reorganization, without evidence, or sufficient evidence?

6. Did the Bankruptcy Court have jurisdiction or authority to issue the ruling set forth in the Show Cause Order under either 11 U.S.C. §105 or §1112?

7. Did the Bankruptcy Court commit reversible error to the extent it found Appellants, or either of them, violated any provision of the Plan of Reorganization?

8. Did the bankruptcy court commit reversible error when it converted this bankruptcy proceeding from a Chapter 11 to a Chapter 7 case?

* * *

Christopher M. Weil
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
	)	
ALLIED PHYSICIANS GROUP, P.A., and ALLIED PHYSICIANS OF DFW, INC.,	)	CASE NO. 397-31267-HCA-7
	)	
	)	
Debtors.	)	

APPELLANTS GREGORY W. GINN AND GREGORY WAYNE GINN, P.C.'S SECOND DESIGNATION OF ITEMS FOR THE RECORD AND STATEMENT OF ISSUES ON APPEAL

(Filed Mar. 23, 2000)

GREGORY W. GINN and GREGORY WAYNE GINN, P.C. (collectively, "Appellants"), Appellants in connection with the appeal from this Court's November 22, 1999 Order on Show Cause Hearing entered in the above-styled and numbered cause, file this their Second Designation of Items for the Record and Statement of Issues on Appeal made pursuant to Federal Rule of Bankruptcy

Procedure 8006, and in support thereof would show the Court as follows:

Pursuant to Federal Rule of Bankruptcy Procedure 8006, Appellants Gregory W. Ginn ("Ginn") and Gregory Wayne Ginn, P.C. ("Ginn, P.C.") submit this designation of items to be included in the appellate record and statement of issues on appeal in supplement to and incorporating by reference those designations made previously by Appellants on or about December 20, 1999.

Issues on Appeal

Appellants seek to present and obtain determination on each of the following issues on appeal:

1. Did the Bankruptcy Court commit reversible error in ordering Appellants to disgorge all fees they had been paid while barring Appellants from presenting evidence and/or testimony of the independent allowance and reasonableness of those fees?

2. Did the Bankruptcy Court commit reversible error by refusing Appellants the right to cross examine and present witnesses and/or to present evidence in response to the Order to Show Cause?

3. Did the Bankruptcy Court make findings regarding Appellants' conduct that were clearly erroneous, particularly but without limitation those findings relating to (a) professionals' deceiving or misrepresenting facts to the Court; (b) the value of insurance claims settled previously under approval and order of the same Court; (c) Appellants' review of professionals' time prior to payment; (d) the financial status of the amounts available to

the estates at the time of the Plan Agent's appointment and the time of the hearing; (e) any purported breaches of fiduciary duty; and (f) any purported gross neglect?

4. Did the bankruptcy court exceed its authority in using section 105 of the Bankruptcy Code to regulate a fee agreements [sic] between the Plan Agent and professionals who were not retained under one of the provisions of the Bankruptcy Code governing the hiring of professional persons by a debtor in possession or a trustee?

5. Did the Bankruptcy Court commit reversible error when it found that James Moon and Eric Liepens did nothing with respect to the review of professionals' invoices and that they had no authority under the Plan of Reorganization, without evidence, or sufficient evidence?

6. Did the Bankruptcy Court have jurisdiction or authority to issue the ruling set forth in the Show Cause Order under either 11 U.S.C. §105 or §1112?

7. Did the Bankruptcy Court commit reversible error to the extent it found Appellants, or either of them, violated any provision of the Plan of Reorganization?

8. Did the Bankruptcy Court commit reversible error when it converted this bankruptcy proceeding from a Chapter 11 to a Chapter 7 case?

* * *

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET, ROOM 12A24
DALLAS, TEXAS 75242-1496

HAROLD C. ABRAMSON
BANKRUPTCY JUDGE (214) 753-2110

March 17, 2000

Texas State Board of Public Accountancy
333 Guadalupe
Tower III Suite 900
Austin, Texas 78701-3900

Re: Findings of Fact and Conclusions of Law in Allied Physicians Case

Dear Sir or Madam:

I have enclosed a copy of Findings of Fact and Conclusions of Law I made in a case entitled *Allied Physicians Group, P.A.*, Case No. 97-31267. They describe what I find to be professional misconduct on the part of Mr. Gregory Wayne Ginn, a CPA licensed in the State of Texas. I thought you might want to review these findings and make an investigation. Mr. Ginn's office address is: 5920 Forest Park Road, Suite 500, Dallas, Texas 75235.

For further information about this case, please contact Ms. Mary Fran Durham at the U.S. Trustee's Office for the Northern District of Texas: (214) 767-8903.

Yours very truly,

/s/ Harold C. Abramson
Harold C. Abramson

Enclosure

cc: Ms. Mary Fran Durham
Office of the U.S. Trustee
1100 Commerce Street, Room 9C60
Dallas, Texas 75242

DOCKET NO. 457-01-1482
COMPLAINT NO. 00-04-18L

IN RE:.	§	BEFORE THE TEXAS
GREGORY W. GINN	§ § §	STATE BOARD OF PUBLIC ACCOUNTANCY

GREGORY WAYNE GINN'S FIRST AND SECOND SETS OF INTERROGATORIES TO THE STATE BOARD

TO: ENFORCEMENT DIVISION OF THE TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY, by and through its representing counsel, Eric Marin, Enforcement Division, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III Suite 900, Austin, Texas 78701-3900.

Please take notice that you are required to serve on the undersigned attorneys at 1601 Elm Street, 1900 Thanksgiving Tower, Dallas, Texas 75201, on or before the answer date applicable to these proceedings under the Rules of Practice and Procedure for Texas Administrative Hearings your answers in writing under oath to the following Interrogatories:

* * *

INTERROGATORY NO. 2:

Please identify (see Definition No. 5) the Complainant in these proceedings.

ANSWER:

* * *

INTERROGATORY NO. 4:

Identify (see Definition No. 5) each person you expect to call as an expert witness at hearing, including without limitation in your identification the name, address, and phone number of each person, the qualifications which entitle or allow him or her to testify as an expert witness, the subject matter and substance of facts and opinions about which the person is expected to testify including the grounds for each opinion, and all documents and reports made or prepared by the person which refer, reflect, and relate to this lawsuit.

ANSWER:

INTERROGATORY NO. 5:

Identify (see Definition No. 5) each expert you do not expect or intend to call as an expert witness at the hearing in this matter, but whose work product forms a basis in whole or in part of the opinions of experts who may be called as witnesses, including without limitation in your identification the name, address, and telephone number of each expert, the qualifications of this expert, the subject matter and substance of facts and opinions and documents which form a basis in whole or in part of the opinions of experts who may testify.

ANSWER:

INTERROGATORY NO. 6:

Please identify each and every witness who you intend to call, if any, at the hearing in support of the Enforcement Division's Notice of Hearing and Complaint.

ANSWER:

* * *

INTERROGATORY NO. 9:

In the event the Board intends to rely upon any document or position or evidence other than the Findings of Fact and Conclusions of Law entered on or about March 3, 2000 by Judge Harold C. Abramson in that certain bankruptcy proceeding styled *In re: Allied Physicians Group, P.A.*, under cause no. 97-31267-HCA-7, then state fully the factual basis of each and every claim, allegation, and defense which you now assert and which you intend to raise at the time of hearing which is not otherwise specifically contained in those Findings of Fact and Conclusions of Law.

ANSWER:

* * *

INTERROGATORY NO. 12:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 501.21 of the Rules of The Texas State Board of Public Accountancy.

ANSWER:

INTERROGATORY NO. 13:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 501.41(2) of the Rules of The Texas State Board of Public Accountancy.

ANSWER:

INTERROGATORY NO. 14:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 501.49(9) of the Rules of The Texas State Board of Public Accountancy.

ANSWER:

INTERROGATORY NO. 15:

To the extent not contained in your responses to the interrogatories propounded above, please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated any of the Rules of The Texas State Board of Public Accountancy other than §§ 501.21, 501.41(2), and 501.49(9).

ANSWER:

INTERROGATORY NO. 16:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 901.502(2) of the Public Accountancy Act.

ANSWER:

INTERROGATORY NO. 17:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 901.502(6) of the Public Accountancy Act.

ANSWER:

INTERROGATORY NO. 18:

Please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated § 901.502(11) of the Public Accountancy Act.

ANSWER:

INTERROGATORY NO. 19:

To the extent not contained in your responses to the interrogatories propounded above, please identify each and every fact and element of evidence which tends to support or contradict your contention, if any, that Ginn has violated any of the provisions of the Public Accountancy Act other than §§ 901.502(2),(6), and (11).

ANSWER:

* * *

INTERROGATORY NO. 21:

Please identify any and all facts that tend to support or contradict any statement that as of November 27, 2000, the Board had provided any notice to the Complainant that the Enforcement Division, or any other division, branch, or group acting as part of or on behalf of the board intended to take away, limit, suspend, revoke, or otherwise impair Ginn's Certified Public Accountant license.

ANSWER:

* * *

Respectfully submitted,

/s/ Anthony A. Petrocchi/WP
Anthony A. Petrocchi
Texas Bar No. 15851700
Christopher M. Weil
Texas Bar No. 21079000

WEIL & PETROCCHI, P.C.
1601 Elm Street, Suite 1900
Dallas, Texas 75201
(214) 969-7272 (office)
(214) 820-7770 (fax)

ATTORNEYS FOR RESPONDENT
GREGORY WAYNE GINN

CERTIFICATE OF SERVICE

A copy of the foregoing Gregory Wayne Ginn's First and Second Sets of Interrogatories to the State Board has been served upon counsel of record for the Texas State Board of Public Accountancy, Eric Marin, Enforcement Division, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III Suite 900, Austin, Texas 78701-3900, by hand delivery on this 13th day of April, 2001.

/s/ Anthony A. Petrocchi/WP

DOCKET NO. 457-01-1482
COMPLAINT NO. 00-04-18L

IN RE:	§	BEFORE THE TEXAS
	§	
GREGORY W. GINN	§	STATE BOARD OF
	§	
	§	PUBLIC ACCOUNTANCY

THE ENFORCEMENT DIVISION'S ANSWERS TO RESPONDENT'S INTERROGATORIES

Pursuant to Rule 155.31 of the Rules of the State Office of Administrative Hearings, the Enforcement Division ("Staff") hereby responds to Respondent's discovery requests.

The following paragraphs include definitions that apply to the specific responses to Respondent's discovery requests contained herein:

"Board" – means Texas State Board of Public Accountancy.

"Respondent" – means Gregory W. Ginn.

* * *

Response to Interrogatory No. 2:

Hon. Harold C. Abramson
United States Bankruptcy Court
Northern District of Texas
1100 Commerce St., Room 12A24
Dallas, Texas 75242-1496
(214) 753-2110

* * *

Response to Interrogatory No. 4:

No expert witnesses have been designated at this time.

Response to Interrogatory No. 5:

No expert witnesses have been designated at this time.

Response to Interrogatory No. 6:

The Enforcement Division does not anticipate calling fact witnesses to testify at the hearing. The Enforcement Division may call attorneys of its own staff regarding Board-related procedural matters.

Staff Attorneys:	Amanda Birrell, Paul Gavia, Eric Marin, Andrea Carter, Laura Nugent
Address:	333 Guadalupe, Tower III, Ste. 900, Austin, Texas 78701
Telephone:	(512) 305-7866

* * *

Response to Interrogatory No. 9:

At this time, the Enforcement Division intends to rely on the findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 as the bases for all allegations against Respondent.

* * *

Response to Interrogatory No. 12:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 13:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 14:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 15:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 16:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 17:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 18:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

Response to Interrogatory No. 19:

The findings of fact and conclusions of law issued by Judge Abramson in Case No. 97-31267 are the bases for all allegations against Respondent.

* * *

Response to Interrogatory No. 21:

The cover letter for an Agreed Consent Order that was mailed to Respondent in which the Behavioral Enforcement Committee offered Respondent a revocation in lieu of further discipline was sent to Mary Frances Durham, an agent of Judge Abramson. No copy of the mailing to Ms. Durham is present in the Board's files except for the fax cover page, which has already been provided to Respondent.

* * *

ENFORCEMENT DIVISION OF
THE TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY
333 Guadalupe, Tower III, Suite 900
Austin, Texas 78701-3900
(512) 305-7866
(512) 305-7854 (FAX)

BY: /s/ Eric T. Marin
Eric T. Marin
ATTORNEY, ENFORCEMENT
DIVISION
State Bar No. 00796995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLIED PHYSICIANS GROUP, P.A. and ALLIED PHYSICIANS OF DFW, INC. Debtors.	§	CASE NO. 397-31267-HCA-11
SCHILLER, PLLC and DAVID SCHILLER, et al., Appellants v. UNITED MEDICAL SUPPLY, et al., Appellees.	§	CIVIL CASE NO. 3:00-CV-616-X [Formerly no. 3:00-CV-1549-X]

BRIEF OF APPELLANTS GREGORY WAYNE GINN AND GREGORY WAYNE GINN, P.C.

Christopher M. Weil
Texas State Bar No. 21079000
Jeffrey W. Hellberg, Jr.
Texas State Bar No. 00796738

WEIL & PETROCCHI, P.C.
1900 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
Telephone: (214) 969-7272
Facsimile: (214) 880-7402

October 6, 2000

* * *

IV. THE BANKRUPTCY COURT MADE FACTUAL FINDINGS THAT WERE CLEARLY ERRONEOUS WHICH ERROR REQUIRES REVERSAL OF THE DISGORGEMENT ORDER.

V. THE BANKRUPTCY COURT COMMITTED ERROR IN FINDING THAT THE PLAN AGENT WAS WITHOUT AUTHORITY TO APPOINT A PLAN ADVISORY COMMITTEE, HAD NOT PROPERLY APPOINTED SUCH A COMMITTEE, AND HAD FAILED TO OBTAIN APPROVAL FOR ALL PROFESSIONAL FEES PAID FROM SUCH A COMMITTEE.

VI. THE BANKRUPTCY COURT COMMITTED ERROR IN REQUIRING THE PLAN AGENT AND THE PROFESSIONALS ENGAGED BY THE PLAN AGENT TO DISGORGE FEES WHEN THE RECORD BEFORE IT, HAD THE COURT REVIEWED ITS OWN FILE, EVIDENCED THAT A PROPERLY APPOINTED COMMITTEE HAD RECEIVED AND APPROVED INVOICES FOR ALL PROFESSIONAL FEES PAID, AND THE INVOICES SO APPROVED HAD BEEN ON FILE WITH THE COURT WITHOUT OBJECTION FOR A SUFFICIENT TIME PRIOR TO THE ENTRY OF AN ORDER REQUIRING SUCH DISGORGEMENT.

The Bankruptcy Court made the findings discussed below, among others, which findings were clearly erroneous. Because those findings necessarily form the underlying basis of the Bankruptcy Court's reasoning in determining erroneously that the Plan Agent be enjoined and that the Plan Agent and other professionals must disgorge and turn over their earned fees and reimbursed

expenses, the review by this District Court and determination that those finding [sic] and conclusions cumulatively are erroneous requires reversal of the Disgorgement Order in its entirely.[sic]

Finding of Fact No. 1

> Mr. Ginn is a Certified Public Accountant and Certified Fraud Examiner. Mr. Ginn is well-educated and articulate as to what information he wants to speak about. The confirmed Plan authorized Mr. Ginn to act as Plan Agent, yet Mr. Ginn testified that he never read the Plan, and that he was not aware of its contents. The Court finds Mr. Ginn's testimony not credible. Mr. Ginn knew that he derived any and all authority he had from the confirmed Plan; he has acted before as a plan agent or liquidating trustee. There were no other written or oral agreements on which Mr. Ginn could have relied. Mr. Ginn testified that he was not operating under the Plan.

BDN 557; Tab 45; RPN 3255-56.

Although the Bankruptcy Court asserts that Ginn has "never read the Plan," the actual testimony at the November 8, 1999 hearing reveals otherwise. More particularly, Ginn testified without implied or expressed contradiction in the one-sided evidence or testimony, as follows:

> Q. No. It's entitled, second amended joint plan of reorganization proposed by the debtors as modified dated December 31st, 1997 and filed January 21, 1998. It was – specific modifications were made that crossed out

any other effective date and inserted May 15th, 1998. Have you read the plan?

A. Yes.

BDN 545; Tab 22; RPN 0959, TR, p. 24, lines 25 through p. 25, line 6; and further testified that:

Q: Now, you also – there's been some confusion as to the effective date. You understood that there was an order of confirmation, correct?

A: Yes.

Q: And you understood that there was an order confirming technical amendments, correct?

A: Yes.

Q: Now, did you see and read the second amended plan of reorganization?

A: Yes.

BDN 545; Tab 22; RPN 0991, Tr. p. 86, lines 20 through p. 87, line 4; and testifying still further:

Q. There is what I call a confirmed plan of reorganization and it says, "second amendment joint plan of reorganization proposed by the debtors as modified." Have you ever seen this document?

A: Yes.

Q: Now, did you believe you were operating under this document?

A: No.

Q: Okay. Now, there was also a second amendment joint plan of reorganization proposed

by the debtors and it didn't have the "as modified" on it. Have you seen that document?

A: Yes.

Q: And that was filed on November the 7th with the disclosure statement, correct?

A: I don't know that.

Q: I'm going to show you a document that's attached to the disclosure statement and it says, "second amendment joint plan of reorganization proposed by the debtors." Have you seen that document?

A: Yes.

Q: Is this the document that you thought you were operating under?

A: Yes.

BDN 545; Tab 22; RPN 0991, Tr. p. 87, lines 19 through p. 88, line 16. The Court's finding that Ginn "testified that he was not operating under the Plan" is taken out of context and misleading. As the previous citation reflects, this issue revolves around versions of the Plan, not whether Ginn was operating under the Plan, a distinction lost by the Court's decision to preclude Ginn from presentation of testimony or evidence in his defense. In fact, in reviewing a number of drafts of the Plan, Ginn testified:

Q: All right, Mr. Ginn. You are operating under this plan; are you not?

A: I didn't think so. I thought I was operating under the plan dated November the 7th,

> 1997 as modified with the three additional orders of the Court.

BDN 545; Tab 22; RPN 0961, Tr. p. 27, lines 6-10. The context of that testimony becomes clearer upon review of the transcript at the December 31, 1997 plan confirmation hearing at which the Bankruptcy Court said, "these modification don't comply . . . and I am not going to approve them." BDN 565; Tab 1; RPN 0169, p. 87, lines 7-23. Of course in his rush to reach a predetermined and biased result, Judge Abramson precluded further testimony and argument that would have clarified this point and avoided the Bankruptcy Court's erroneous finding. Perhaps the Bankruptcy Court was projecting its own failures to review the Plan on to the Plan Agent. During the Confirmation Hearing, the Bankruptcy Court even acknowledged it had not read the Plan. BDN 565; Tab 1; RPN 0088; Tr. p. 6, line 16 through p. 7, line 5.

Finally, the Bankruptcy Court asserts that Ginn "has acted before as a plan agent or liquidating trustee," which is directly contrary to Ginn's own testimony (BDN 545; Tab 22; RPN 1001, Tr. p. 106, lines 13-18), and to which testimony no controverting evidence or testimony was presented.

Finding of Fact No. 2

> Mr. Ginn was present at the confirmation hearing on December 31, 1997, and testified about his role in carrying out the terms of the Plan at that hearing. The Court made him aware of its concerns that professional fees not consume the estate to the detriment of creditors. The Plan contained only a few provisions to protect the estate, and Mr. Ginn disregarded

> every one of them. For example, he disregarded the requirement that fee statements be sent to the Court and to the committee; and he changed the composition of the committee that was to review the fees within days of confirmation and without authority.

BDN 557; Tab 45; RPN 3256.

At BDN 545; Tab 22; RPN 00960, Tr. p. 26, lines 11-13, the Bankruptcy Court indicated that it would "take judicial notice of the records of the Court in this case and that will solve the problem." The finding of fact finally entered by Judge Abramson suggests otherwise. The undisputed testimony and evidence before the Bankruptcy Court was that Ginn consistently provided copies of professionals' statements to the so-called Reconstituted PAC. *See e.g.*, BDN 545; Tab 22; Back of RPN 0970, Tr. p. 46, lines 16-24; BDN 496; Tab 24; Exhibit H; RPN 2229-RPN 2295; RPN 2235-2301. The Court would undercut this compliance with the conclusion that Ginn's restructuring of the Plan Advisory Committee was a violation of the Plan, which conclusion has no basis in the record or law. *See* discussion of finding of fact no. 11, below. In fact, the language of the Plan itself suggests that the committee was not made of some unchangeable panel, providing that, "[t]he Plan Advisory Committee shall ***initially*** consist of Rick J.W. Graham, Chris Bernal, and Pamela Prince. BDN 266; Tab 2; RPN 0192, ¶1.68 (emphasis added). Moreover, had the Bankruptcy Court taken judicial notice of the record, it would have determined that on or about October 15, 1999, there was filed the Notice of Professional Fees and Expenses Incurred by Reorganized Debtor (BDN 467; Tab 16; RPN 0417-RPN 0910),

to which the fee statements of all professionals, including the Plan Agents', were attached and in response to which Notice no objections were filed. The Plan does not set forth any requirements on the part of the Plan Agent regarding the processing of the payment of professional fees if no objection is raised to same within 15 days of filing. The fact that the statements were filed after payment to professionals in response to that oversight having been brought to the attention of the Plan Agent is tempered further by the fact that no objections have ever been filed to those fee statements.

Finding of Fact No. 3

> The Plan required Mr. Ginn to maintain estate funds in a depository approved by the United States Trustee. This requirement means, generally, that Mr. Ginn was required to keep the estate funds in an FDIC insured banking institution, which is not an onerous requirement.

BDN 557; Tab 45; RPN 3256.-

The Plan provisions referred to by the Court in Finding of Fact No. 3 include the following:

> 7.11 *Distributable Cash.* All funds constituting Distributable Cash shall be collected by the Plan Agent, and pending the Initial Distribution Date, such funds shall be deposited with an entity that provides banking services and has been approved by the Office of the United States Trustee as an approved entity for maintenance of debtor-in-possession bank accounts. The Distributable Cash will be held by the Plan Agent until it is distributed to any holder of an

> Allowed Claim or Equity Interest pursuant to the Plan.

BDN 266; Tab 3; RPN 0200.

Paragraph 1.35 of the Plan defines "Distributable Cash" as the aggregate amount of Cash on Hand less the Cash Reserve Fund. BDN 266; Tab 3; RPN 0189. Under Paragraph 1.18, the "Cash Reserve Fund" is the fund of Cash utilized by the Plan Agent to prosecute Avoidance Actions, other lawsuits, objections to Claims, and any other matters including, without limitation, the retention and payment of Professionals by the Plan Agent. The amount of the Cash Reserve Fund shall be determined by the Plan Agent. BDN 266; Tab 3; RPN 0188.

Accordingly, not all funds of the Estate were required to be kept in an FDIC insured account and, in taking judicial notice of the record, the Bankruptcy Court could and should determine that the remaining amount of the Estate's funds were kept in FDIC insured institutions. The Plan Agent maintained the Distributable Cash at all times in the Wells Fargo Bank, an FDIC insured bank. BDN 545; Tab 22; RPN 0973, Tr. p. 51, lines 19-23.

Finding of Fact No. 4

> Mr. Ginn testified that he did not keep estate funds in an FDIC insured banking institution nor was he aware of this provision in the Plan. Instead, Mr. Ginn gave $300,000 of estate money to a friend, Waylon E. McMullen, as a loan on a handshake. Mr. Ginn not only loaned estate funds to a friend, he did not require a writing to require the repayment of the funds. Mr. Ginn's actions violated the terms of the Plan and feel beneath a standard of any reasonable

> business judgment. This was a breach of his fiduciary duty. This section alone supports a determination that Mr. Ginn was grossly negligent, breached his fiduciary duty to creditors and violated a material term of the Plan.

BDN 557; Tab 45; RPN 3256-57.

The requirements regarding retaining estate funds in an FDIC insured account and the Plan Agent's compliance with that requirement are initially discussed above in the response to Finding of Fact No. 3. Moreover, if the Bankruptcy Court had permitted testimony in defense of Ginn's position by reference to the record, the Bankruptcy Court would have learned with substantiated testimony that the loan was repaid with interest (*see infra*, discussion of finding of fact no. 6), a fact that should be included in the Court's findings.

Finding of Fact No. 6

> As the Plan Agent, Mr. Ginn owed creditors a duty as a fiduciary. By disregarding clear and simple terms of the Plan, such as the requirement to keep all funds in an FDIC insured institution, he breached his duty to creditors and the estate. By loaning a large sum of money, about half of all money in the estate at the time, to a friend, without a writing as evidence, he placed all of that money at risk. There was no evidence, aside from Mr. Ginn's self-serving statement, that any of that money has been repaid to the estate.

BDN 557; Tab 45; RPN 3257.

As discussed above in the response to Finding of Fact No. 3, the Plan did not require the Plan Agent to keep all

funds in an FDIC insured institution. Moreover, with respect to the Court's comment about Ginn's supposed "self-serving" testimony, Exhibit G (BDN 496; Tab 24; Exhibit G; RPN 2180) reflects in the statement dated 11/19/98 to 12/16/98, a deposit on 12/15/98 of $100,000 (RPN 2200), in the statement dated 3/17/99 to 4/19/99, a deposit dated 4/5/99 in the amount of $100,000.00 (RPN 2204), in the statement dated 6/17/99 to 7/19/99, a deposit dated 6/30/99 in the amount of $26,500.00, which included a $20,000 deposit (RPN 2207), and in the available but not introduced bank statement dated 9/18/99, a deposit dated 9/20/99 in the amount of $80,000. Ginn offered to demonstrate those repayments at BDN 545; Tab 22; RPN 0974, Tr. p.53, lines 18 through p. 54, line 1, but apparently such substantiation was either not important at the time or simply too exculpatory to be of interest to the U.S. Trustee or the Bankruptcy Court.

In fact, the record before the Bankruptcy Court supports a finding that the subject amounts were repaid in full, a fact that the Bankruptcy Court also could have established when it was searching outside the record for such facts as those it recites in its footnote. Accordingly, rather than impugning Ginn's testimonial credibility without basis for same, the Bankruptcy Court might have taken notice of the record before it to confirm repayment of the very loan which the Bankruptcy Court found constituted a violation of the Plan Agent's fiduciary duty. In fact, Judge Abramson's dismissive treatment of contrary evidence before him and refusal to permit cross-examination or Ginn's testimony on this issue is nearly incomprehensible behavior from a purportedly neutral tribunal and fact finder, particularly in light of his comment that

the loan "alone supports a determination that Mr. Ginn was grossly negligent, breached his fiduciary duty to creditors and violated a material term of the Plan." BDN 557; Tab 45; RPN 3257.

Finding of Fact No. 7

> Although Mr. Ginn was aware of the Court's concern that professional fees might consume the estate, Mr. Ginn ignored the Plan provisions to protect estate money from unnecessary dissipation. He did not require any professional to submit a copy of their bill to the Court before he paid them. The Plan was clear that each professional must so comply. In response to the Show Cause item directing Mr. Ginn to produce each and every document evidencing the fact that the professional complied with the Plan before he was paid, Mr. Ginn produced nothing. Mr. Ginn did not require any professional to comply with the terms of the Plan before he paid the fee and expense.

BDN 557; Tab 45; RPN 3257-58.

Although the Bankruptcy Court stated that Ginn failed to produce documents evidencing compliance with the Plan relating to professional fees paid, Ginn did in fact produce Exhibit E, the professionals' fee statements (*see*, BDN 545; Tab 22; RPN 0955, Tr. p.15, line 19 through p. 16, line 11). The Bankruptcy Court stated it took judicial notice of the record (*see*, BDN 545; Tab 22; Back of RPN 0960, Tr. p. 26, lines 11-13), which included the Notice of Professional Fees and Expenses Incurred by Reorganized Debtor (BDN 467; Tab 16; RPN 0417), the Application by David A Schiller for Plan Agent For Compensation (BDN 397; Tab 8; RPN 0234), and the signed

letters approving fees paid from the committee (BDN 496; Tab 24; Exhibit H; RPN 2229-2295). The record also reflected that no objections were made within 15 days of the filing of the Notice. *See generally,* Certified Copy of Docket Sheet. In fact, to date there have been none.

Accordingly, the Bankruptcy Court's finding is based upon conclusions directly contrary to documents contained in the records before it, some of which were discussed during the testimony at the November 8, 1999 Show Cause Hearing. Given the clear state of the record and these inexplicable unsupported, contrary findings of fact, one must wonder what Judge Abramson was thinking of during the hearing other than his desired and preconceived ruling, notwithstanding any evidence before him.

Finding of Fact No. 8

> In response to the Show Cause item which required Mr. Ginn to produce the bill received which caused him to pay each professional, Mr. Ginn produced only the cover letters requesting payment. The Plan was clear in stating that before Mr. Ginn should pay any professional, the professional was to submit his invoices to the Plan Agent, the Plan Advisory Committee and the Bankruptcy Court. None of the professionals complied with this procedure; nevertheless, Mr. Ginn paid the professionals in full and promptly. In fact, not one professional, including Mr. Ginn himself, complied with the terms of the Plan before accepting payment of estate funds.

BDN 557; Tab 45; RPN 3258.

Again the Bankruptcy Court, although stating that it took notice of the papers in the record before it, overlooked the October 15, 1999 filing of the Notice of Professional Fees and Expenses Incurred by Reorganized Debtor (BDN 467; Tab 16; RPN 0417) and the Application by David A Schiller for Plan Agent For Compensation filed November 10, 1998 (BDN 397; Tab 8; RPN 0234). These papers contain the detailed billings of all professionals and were on file with the Bankruptcy Court at the time of the November 8, 1999 Show Cause Hearing. Ginn also presented his own billings which were marked as Exhibit B (BDN 545; Tab 22; RPN 0954, Tr. p.14, lines 23 through p. 15, line 3; BDN 496; Tab 24; Exhibit B; RPN 1271-2098) and were the subject of testimony. The statement that Ginn failed to follow the proper procedure for payment of his own fees also is not supported. The Plan does not require the Plan Agent to submit his fees to the Reconstituted PAC for approval or to file same with the Court as a condition of payment. BDN 266; Tab 3; RPN 0200, ¶ 7.12(a).

Finding of Fact No. 11

> Mr. Ginn testified that he replaced the members of the Plan Advisory Committee with a business associate, James Moon, and Mr. Moon's former law associate, Eric Liepins. Mr. Ginn admitted that the Plan did not give him authority to alter the composition of the Plan Advisory Committee, but he did it anyway because he thought the true members of the Plan Advisory Committee would be critical of attorney fees. Mr. Ginn did not notify any member of the Plan Advisory Committee that he had removed them.

BDN 557; Tab 45; RPN 3259.

Initially, the Court's finding that "Mr. Ginn admitted that the Plan did not give him authority to alter the composition of the Plan Advisory Committee," has no support anywhere in the record. To the contrary, Ginn testified that before he changed the composition of that committee, he consulted Debtors' counsel:

Q: And immediately when you were employed as a plan agent, you just replaced those three people with two other people on something that has been called a Fee Committee, correct?

A: I replaced the initial members of the Plan Advisory Committee with two other persons.

* * *

Q: Now, did you rely on counsel in replacing – advice of counsel in replacing the Plan Advisory Committee members?

A: Yes.

Q: What counsel did you rely on?

A: Pat Neligan.

Q: Now, did you employ Mr. Neligan?

A: Yes.

Q: And Mr. Neligan told you what with respect to replacing the Plan Advisory Committee members?

A: That the plan lists the initial members and I told Mr. Neligan that the lawyer and the second member were adverse to the estate in connection with the D&O litigation. And

did I have the authority to replace the members?

* * *

Q: And you replaced them with James Moon and Eric Liepins, correct?

A: Yes.

Q: Now, why did you select Mr. Moon and Mr. Liepins?

A: They were attorneys. They represented two of the largest creditor constituencies of the unsecured creditors. I felt they would provide assistance in analyzing the matters and the fees.

BDN 545; Tab 22; RPN 0996, Tr. p. 96, lines 7 to p. 97 line 18. At the December 31, 1997 Confirmation Hearing, James P. Moon appeared on behalf of UMSC. BDN 565; Tab 1; RPN 0090, Tr. p. 9, lines 15-18. Again, at the November 8, 1999 Show Cause Hearing, James Moon appeared and confirmed that he was the vice-president and general counsel for UMSC, a large creditor of the Debtors' consolidated estate. BDN 545; Tab 22; Tr. p. 5, line 22 through p.6, line 1. However, because of Judge Abramson's refusal to permit Ginn to present any evidence, Moon's testimony was never before the Court. In addition, at the December 31, 1997 Confirmation Hearing, Eric A. Liepins appeared on behalf of an unsecured creditor holding seven percent (7%) of the unsecured claims. BDN 565; Tab 1; RPN 0091, Tr. p. 10, lines 1-4.

Moreover, under the Plan, the Plan Agent was given broad powers, including the power to "(ii) do all other acts that may be necessary or appropriate for the final

liquidation and distribution of the Assets [of the Debtors]." BDN 266; Tab 3; RPN 0199, ¶7.5. Ginn did not "admit" that he was without authority to restructure the committee. The undisputed testimony is that he consulted with counsel and came to a well-reasoned, contrary conclusion. The Plan does grant powers broad enough to include such actions by the Plan Agent. While the Bankruptcy Court may choose erroneously to read the powers of the Plan Agent more narrowly under the Plan as a matter of law, there is no factual or legal basis in the record for doing so.

Finding of Fact No. 12

> Mr. Ginn knew and understood that the point of having a Plan Advisory Committee was to provide for an honest review of professional bills in this case, yet he found a way to circumvent the Plan's protection of estate money. By appointing his personal sycophants, Mr. Ginn insured that he could expend all or a substantial portion of the creditors' money on himself, his employees, attorney David Schiller, as well as the professionals of Mr. Ginn's choosing.

BDN 557; Tab 45; RPN 3259.

The Court's disparaging characterization of James Moon and Eric Liepins as Ginn's "personal sycophants" finds no support in the record or testimony and should be summarily disregarded from any responsible and reasoned findings entered by a court. Nor does the testimony or evidence at the November 8, 1999 Show Cause Hearing support that the restructuring of the committee in any way precluded an honest review of the professional bills or that any of those fees were not reasonable

and justified for the matters involved. In fact, the Bankruptcy Court consistently refused to hear any evidence or testimony on whether any of the fees incurred and/or paid by professionals were reasonable.

Moreover, the restructuring of the committee did not create new powers or freedom for the Plan Agent not already in existence. Under ¶7.12(b) of the Plan,

> The Plan Agent may retain professionals for activities deemed to be necessary and appropriate by the Plan Agent including, without limitation, bringing any Avoidance Action and any other claims which the Debtors or their estates may have against persons or property.

In addition, ¶7.5 of the Plan (BDN 266; Tab 3; RPN 0199) provides that "subject to the provisions of the Plan, the Plan Agent shall be solely responsible for management and distribution of the Assets . . . " Had the Court permitted a review of the invoices and the accounting filed by the Plan Agent, those papers would have evidenced that several million dollars of value in the form of cash collected and the reduction of claims by far exceed the payments to the Plan Agent and the professionals for their respective services. *See infra*, discussion regarding finding of fact nos. 17 and 18. However, having precluded the presentation of such evidence and testimony from the record of the Show Cause Hearing, the Court has no basis to reach the factual conclusions summarily set forth without support in finding of fact no. 12. In fact, the undisputed, supported evidence before the Bankruptcy Court established that Ginn had authority to engage professionals as he believed to be appropriate, and there is no

evidence that any of the fees incurred or paid were not reasonable for the tasks performed.

Finding of Fact No. 13

> Mr. Ginn's billing records reflect that he did not review any fees. Mr. Ginn bills just a few hours over a twenty month time period to review only one or two fee invoices out of the dozens he received. He bills every month for an employee to put the fee invoice in a binder and send a letter to Mr. Moon and Mr. Liepins. Neither Mr. Moon nor Mr. Liepins made any written comment about any fees. Mr. Schiller testified that he and Mr. Moon are in a law partnership together.

BDN 557; Tab 45; RPN 3259.

Interestingly, the first two sentences of Bankruptcy Court's finding of fact no. 13 are inconsistent. First, the Bankruptcy Court asserts that Ginn "did not review any fees," but then counters with the acknowledgment that Ginn "bills just a few hours over a twenty month time period to review only one or two fee invoices." Imagine what true facts the Bankruptcy Court could have learned had it permitted the parties to provide testimony on the subject of fee review. *See* proffer of testimony at BDN 545; Tab 22; RPN Back of 1050, Tr. pp. 204-207. Contrary to the Bankruptcy Court's conclusion that Moon and Liepins made no written comments on the bills, the testimony at BDN 545; Tab 22; RPN 0956, Tr. p. 17, lines 11-13, and the documents contained in Exhibit H (BDN 446; Tab 24; Exhibit H; RPN 2229) evidence that Moon and Liepins provided written comment when signing each page of the cover sheets to those invoices stating that they had no

objection to allowing the payment of same by the Plan Agent. The undisputed testimony is that Ginn adjusted the invoices of at least one of the professionals. *See*, BDN 545; Tab 22; Back of RPN 0971, Tr. p.48, line 21 through p. 49, line 15.

Accordingly, contrary to the Bankruptcy Court's finding, the undisputed record evidence reveals that Ginn, Moon and Liepins each reviewed the professionals' invoices submitted to some extent and approved same for payment. Although the Bankruptcy Court obviously believed that the review was not as thorough as it should have been, the Bankruptcy Court's decision to preclude Ginn from putting on evidence to the contrary of that notional conclusion or to allow testimony on the reasonableness of fees submitted, makes that finding insupportable and irresponsible for a tribunal charged with responsible review and consideration of evidence presented and offered.

Finding of Fact No. 14

> Mr. Schiller and Mr. Ginn share office space. Mr. Ginn testified that about a month after the Court confirmed the Plan that authorized him to be the Plan Agent, Mr. Schiller moved into Mr. Ginn's office space. The contract between Mr. Schiller and Mr. Ginn as Plan Agent for Mr. Schiller to provide attorney services is dated four days after the Court signed the confirmation order. The testimony was that Mr. Schiller moved in with Mr. Ginn approximately one week later.

BDN 557; Tab 45; RPN 3260.

Again, in his haste to cast a negative light upon Ginn and Schiller (and by implication upon all of the professionals engaged by Ginn), the Bankruptcy Court misstated the pertinent facts. Ginn caused the documents of the consolidated Debtors to be moved into non-adjacent lease space on the same floor as his then existing office. Schiller sub-leased approximately 20% of that non-adjacent lease space. This discrepancy between the actual facts and the Court's findings becomes clear from a review of Exhibit J (BDN 496; Tab 24; RPN 2381) and the following testimony exchange:

Q: And those are some of the expenses that you incurred as plan agent and repaid yourself? You reimbursed your expenses?

A: No.

Q: Why did you pay yourself, then?

A: The rent checks were for space leased for Allied Physicians DFW and Allied Physicians, P.A. I collected that money into my trust account and remitted it to the landlord.

Q: And Exhibit J was your lease payments. You leased a space of approximately 50 feet by 40 feet for just the records, 2062 square feet, correct?

A: Can I see that? There's a diagram at the back that tells the square footage.

Q: That is the square footage that's on there. Do you dispute that? It's printed on this page.

MR. WEIL: The witness has asked to see the document, Your Honor.

THE COURT: Ms. Durham, where is that exhibit you're looking at?

MS. DURHAM: The one without yellow on it that's labeled J.

THE COURT: Okay. Is that the original check, or is that –

MS. DURHAM: No. It's a lease that Mr. Ginn – the lease Mr. Ginn entered into

THE COURT: Pardon me.

A: The square footage is the last page behind tab 1 of Exhibit J. And the suite was Suite 288N and the square footage on the chart is 2582 square feet.

Q. So the records, if I read this document correctly, took up 2062 square feet and Mr. Schiller took up about 520 square feet?

A: Yes, ma'am.

BDN 545; Tab 22; RPN Back of 0968000963, Tr. p. 42, lines 20 through p.44, line 2; BDN 496; Tab 24; Exhibit J; RPN 2381. Schiller further explained the separate office structure during his limited testimony before the Court:

Q: Just so I understand your testimony, Mr. Ginn's prime lease has a certain number of square feet and you sublet a percentage of those square feet?

A: Mr. Ginn entered, I understand entered into what he referred to was a project lease of Suite 288 where he wanted to house all the Allied documents. I paid a portion of that project lease, which was a short-term lease

> separate and apart, I think, from his initial lease. Mr. Ginn was in Suite 205.

BDN 545; Tab 22; RPN Back of 1023; Tr. p. 150, lines 5-13.

Schiller and Ginn officed in separate lease spaces until December of 1998, when Ginn's accounting firm moved his office and began subleasing a portion thereof to Schiller's firm. In September of 1998, prior to that office move, the Allied documents were moved to a storage facility. BDN 496; Tab 24; Exhibit J; RPN 2381. Even in the new offices, Ginn and Schiller's firm maintained separate and distinct office operation areas. *See*, BDN 545; Tab 22; RPN 1023, Tr. p. 149, lines 20 through p.150, line 13. There is no evidence or testimony to the contrary. Moreover, and ironically, after entry of the Disgorgement Order and conversion to a Chapter 7 proceeding, the Court approved the employment of Passman & Jones, a law firm that shares office space with the Chapter 7 trustee, Scott Siedell. *See*, Certified Copy of Docket Sheet.

Finding of Fact No. 15

> Mr. Ginn and Mr. Schiller testified about the payment to Mr. Schiller of a contingency fee on an insurance settlement. Mr. Ginn stated he had two contracts with Mr. Schiller to perform legal services. Mr. Schiller was a two-year lawyer who was hired by Mr. Ginn at a substantial hourly rate for services under one contract. The other contract was a contingent fee contract. Both contracts recited, verbatim, Plan paragraph 7.12, requiring Mr. Schiller to file his fee requests with the Court and the Plan Advisory Committee. The contingent fee contract pertained to a particular insurance case and had a contingency fee based on net proceeds. Mr. Ginn

> and Mr. Schiller ignored the contract and paid Mr. Schiller a percentage of gross proceeds without submission to the Plan Advisory Committee.

BDN 557; Tab 45; RPN 3260.

As noted elsewhere, the Reconstituted PAC approved all fees paid to professionals by the Plan Agent (*see supra* discussion regarding findings of fact nos. 2, 7, and 8). In addition, the Notice of Submission of Application by David A Schiller For Compensation was filed on or about November 10, 1998 (BDN 396; Tab 8; RPN 0234). Accordingly, the committee approved Schiller's fee and the notice of fees was on file with the Court of over 15 days without objection. While through oversight, Schiller may unintentionally have been overpaid (*see*, BDN 545; Tab 22; RPN Back of 0918, Tr. p. 66, lines 13-18) and a reduction of that fee should be made, calculating in the expenses prior to the determination of the contingency, the Plan was followed in connection with the payment of that fee to Schiller.

Finding of Fact No. 17

> Of the approximate $2,100,000 Mr. Ginn admits to collecting for the creditors, his Report states that he paid approximately $1,000,000 to himself and the attorney with whom he shares office space, paid approximately $400,000 to other professionals for post-confirmation work, and retained $652,030. Except for the payment of a small, secured claim of approximately $40,000, Mr. Ginn has not paid a single creditor any of the $2,600,000 of which he ultimately controlled.

BDN 557; Tab 45; RPN 3161.

As reflected in Exhibit A (BDN 496; Tab 24; Exhibit A; RPN 1064), the Plan Agent made a number of payments to satisfy pre-confirmation administrative claims, which payments were made pursuant to orders from the Bankruptcy Court (*see e.g.*, docket entries 403,405,406,407,408,415; RB 0054-0055). Claims of over $900,000.00 were satisfied out of efforts of the Plan Agent and the professionals he hired. *See*, Exhibit B (BDN 496; Tab 24; Exhibit A; RPN 1271-2098). In addition, in October of 1999, the Plan Agent sought court approval for the payment of the 401K claims which the Court would not approve despite lack of any opposition and the support of all parties involved. *See*, docket entries 465, 466, and 475. Therefore, the record before the Bankruptcy Court, and before this Court, indicates that the finding on this point clearly is erroneous.

Finding of Fact No. 18

> Mr. Ginn commenced the case with $470,496.17, collected receipts of $1,141,763 for a total of $2,612,259. He paid about $1,000,000 to himself and Schiller and another $1,000,000 to other attorneys.

BDN 557; Tab 45; RPN 3261.

The Plan Agent's Accounting of September 20, 1999 reflects deposits of $2,141,763.39. BDN 459; Tab 10; RPN 0373. In addition, the Plan provided the order in which claimants were to be paid, beginning with the satisfaction of administrative claims and followed by the respective additional classes of claims. Exhibit A (BDN 496; Tab 24; Exhibit A; RPN 1064) reflects payments for court-ordered pre-confirmation administrative claims (*see*, Certified Copy of Docket Sheet, entries 403, 405, 406, 407, 408, 415;

RPN 0054-0055). Claims of over $900,000.00 were satisfied by efforts of the Plan Agent and the professional he hired. Accordingly, the "accounting" by the Bankruptcy Court reflected in finding of fact no. 18, while certainly creative, is materially inaccurate, misleading, and erroneously fails to reflect the true efforts and successes of the Plan Agent.

Finding of Fact No. 20

> After two years, Mr. Ginn holds an estate with about the same amount of money with which he started, having spent substantially all increments of increase.

BDN 557; Tab 45; RPN 3261.

As set forth in the discussion of findings of fact nos. 18 and 19, the Bankruptcy Court's initial findings regarding the estate accounting are creative, but also erroneous and not based upon any evidentiary support in the record. The Plan Agent satisfied the secured lender Heller Financial. In addition, the Plan Agent satisfied the Banc One Leasing Obligations. The Court's myopic analysis of only cash account changes fails to take into account the true value provided to the Reorganized Debtor by the Plan Agents' efforts. Those items also include the ongoing royalty provided from the Trellix Litigation, as well as the substantial investment in prosecution of claims in *Ginn v. St. Paul* (adversary no. 99-3012), litigation which the Plan Agent believed to be the most valuable claim the Estate had, although that value has yet to be realized as a consequence of the Disgorgement Order and events following the entry of same.

The commutative effect of the Bankruptcy Court's multiple erroneous findings addressed above leads to

only one pertinent conclusion for this appeal. The Bankruptcy Court based its conclusions of law upon erroneous findings of material fact, all of which resulted in the improper entry of the Disgorgement Order erroneously requiring enjoining further action by the Plan Agent, conversion of the bankruptcy to a Chapter 7 proceeding, and disgorgement of amounts received by the Plan Agent and the professionals engaged by the Plan Agent. Moreover. Perhaps more importantly, a careful review of the record before the Bankruptcy Court at the Show Cause Hearing reveals that had Judge Abramson truly considered same, he would have properly concluded that the Plan authorized the Plan Agent to appoint new members of and to form the Reconstituted PAC, that the members thereof were logical and appropriate choices for such review, the unsecured creditors represented by those members having the most at stake, that the fee statements were submitted, reviewed, and approved by the Reconstitute PAC, and that the fee statements of professionals all were on file with the Bankruptcy Court for over 15 days without objection having been lodged, all before the Bankruptcy Court entered the Disgorgement Order. Therefore, the Disgorgement Order should be reversed by this Court in all things.

* * *

Supreme Court, U.S.
FILED
NOV 5 2001

No. 01-391

In the Supreme Court of the United States

GREGORY WAYNE GINN AND GREGORY WAYNE GINN, P.C., PETITIONERS

v.

UNITED STATES TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction under 28 U.S.C. 158(d) to review a district court decision affirming certain preliminary rulings of a bankruptcy court and remanding the case to the bankruptcy court for further proceedings.

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In the Supreme Court of the United States

No. 01-391

GREGORY WAYNE GINN AND GREGORY WAYNE GINN, P.C., PETITIONERS

v.

UNITED STATES TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported. The orders of the district court (Pet. App. 2, 3-5, 6-7) and the decision of the bankruptcy court (Pet. App. 8-26) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2001. The petition for a writ of certiorari was filed on August 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of filings by Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. for relief under the debt reorganization provisions of Chap-

ter 11 of the Bankruptcy Code. 11 U.S.C. 1101 *et seq.* Allied Physicians Group, P.A. was owned by a group of physicians. Its primary asset was 100% of the stock of Allied Physicians of DFW, Inc., whose business was to collect accounts receivable for the physicians and to pay salaries, benefits, vendors, and office expenses. The debtors, with the approval of an official unsecured creditors' committee, filed a liquidating plan which, in a later amended form, was confirmed by the bankruptcy court. The two cases were consolidated in the order confirming the plan. The plan created the position of a Plan Agent and identified petitioners, Gregory Wayne Ginn and Gregory Wayne Ginn, P.C., as the Plan Agent. Pet. App. 8-10.

The primary responsibility of the Plan Agent was to recover and liquidate the assets of the estate. The plan set out a procedure for the authorization of payments to professionals hired by the Plan Agent by which the professional was to file a fee statement with the bankruptcy court and submit it to the Plan Agent and the Plan Advisory Committee. If no objection was filed, the Plan Agent was to pay the amount set forth in the statement. The plan also addressed fees of Mr. Ginn providing that he could be compensated at an hourly rate of $160.00 per hour and reimbursed for reasonable out-of-pocket expenses incurred in the performance of his duties. Pet. App. 10-12.

In September 1999, pursuant to the bankruptcy court's request, Mr. Ginn filed a Status Report which detailed the estate's income and disbursements. Based upon information disclosed in the Status Report, the bankruptcy court determined that Mr. Ginn had compensated himself and his attorneys without complying with the terms of the plan. Pet. App. 30-32. Pursuant

to a request by the United States Trustee[1] and based on the results of the Status Report, the bankruptcy court issued a Show Cause Order directing Mr. Ginn to appear at a hearing and show cause why he should not be removed as Plan Agent and why he should not be required to disgorge all payments for compensation and expenses in the case. *Id.* at 33. After the hearing, the bankruptcy court enjoined Mr. Ginn from making any payments unless otherwise ordered by the court and enjoined all attorneys representing the Plan Agent from taking further action on behalf of the Plan Agent without further order of the court. The court also ordered Mr. Ginn and other professionals to disgorge any unapproved payments received from the Plan Agent and remit those payments to the registry of the court. The bankruptcy court also converted the case from a Chapter 11 proceeding to a Chapter 7 proceeding. Those rulings were memorialized in a Show Cause Order, dated November 11, 1999. *Id.* at 27-28.

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[1] The United States Trustee's Program within the Department of Justice was created by Congress to aid in the administration of bankruptcy cases. See, *e.g.*, *Morgenstern* v. *Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990). Each U.S. Trustee supervises the administration of bankruptcy cases as appropriate and maintains a panel of private trustees who are available to serve as trustees in bankruptcy cases. See 28 U.S.C. 586. The U.S. Trustee has standing to raise any issue under the bankruptcy title and may appear and be heard on any bankruptcy issue, although a Trustee may not file a reorganization plan. See 11 U.S.C. 307; *Haden* v. *Pelofsky*, 212 F.3d 466, 468 n.5 (8th Cir. 2000); *U.S. Trustee* v. *Fishback (In re Glados)*, 83 F.3d 1360, 1361 n.1 (11th Cir. 1996); *U.S. Trustee* v. *Columbia Gas Systems Inc. (In re Columbia Gas Systems Inc.)*, 33 F.3d 294, 295-299 (3d Cir. 1994); *Morgenstern* v. *Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d at 499-500.

The bankruptcy court subsequently issued Findings of Fact and Conclusions of Law, ruling that Mr. Ginn had intentionally breached his duty as a fiduciary to the creditors under the plan and had acted in a grossly negligent manner. Pet. App. 23. The bankruptcy court reiterated its preliminary disgorgement ruling and ordered Mr. Ginn and the attorneys who were paid in violation of the provisions of the plan to disgorge all receipts "pending some later determination by the Court as to entitlement of fees and expenses, if any." *Id.* at 26.

2. The district court affirmed the bankruptcy court's Show Cause Order and its findings and conclusions and remanded the case for "further proceedings not inconsistent with [its] opinion." Pet. App. 4. The district court stated that the bankruptcy court's findings and conclusions were "preliminary," and subject to change as a result of the further proceedings to be conducted in the bankruptcy court to determine appropriate fees and expenses. *Ibid.* The district court also stated that its ruling did not preclude the bankruptcy court "from modifying or vacating" its findings and conclusions "as needed to effectuate a fair and prompt distribution of the disgorged funds, and to comply with the requirements of procedural due process." *Ibid.*

3. In an unpublished per curiam order, the court of appeals dismissed petitioners' appeal for lack of jurisdiction. Pet. App. 1.

ARGUMENT

The court of appeals correctly dismissed petitioners' appeal. All of the courts of appeals agree that where, as here, the bankruptcy court ruling is *not final*, the district court order reviewing the interlocutory bankruptcy ruling is not subject to an immediate appeal

under 28 U.S.C. 158(d). The circuit conflict identified by petitioners pertains to the finality of district court remands on review of a *final* bankruptcy court order, and the conflict therefore is not implicated in this case.

1. District courts have jurisdiction to hear appeals from final judgments and orders of bankruptcy courts, 28 U.S.C. 158(a)(1), and, "with leave of the court," to hear appeals "from other interlocutory orders and decrees." 28 U.S.C. 158(a)(3). Courts of appeals have jurisdiction to hear "appeals from all final decisions, judgments, orders, and decrees" entered by the district court or a bankruptcy appellate panel. 28 U.S.C. 158(d).[2] All of the courts of appeals have concluded that, where the bankruptcy court ruling is not final, the district court order reviewing the interlocutory bankruptcy ruling is also not final for purposes of 28 U.S.C. 158(d). *Stubbe* v. *Banco Cent. Corp. (In re Empresas Noroeste, Inc.)*, 806 F.2d 315, 316 (1st Cir. 1986); *Flor* v. *BOT Fin. Corp. (In re Flor)*, 79 F.3d 281, 283 (2d Cir. 1996); *Commerce Bank* v. *Mountain View Vill., Inc.*, 5 F.3d 34, 36 (3d Cir. 1993); *Sumy* v. *Schlossberg*, 777 F.2d 921, 922-923 (4th Cir. 1985); *Andrews & Kurth, L.L.P.* v. *Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 420 (5th Cir. 1998); *Marlow* v. *Rollins Cotton Co. (In re Julien Co.)*, 146 F.3d 420, 422 (6th Cir. 1998); *In re Rimsat Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *Lewis* v. *United States, Farmers Home Admin.*, 992 F.2d 767, 768, 772 (8th Cir. 1993); *Stanley* v. *S.S. Retail Stores Corp. (In re S.S. Retail Stores Corp.)*, 162 F.3d 1230, 1232 (9th Cir. 1998);

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[2] This Court also has recognized that an interlocutory appeal sought pursuant to 28 U.S.C. 1292(b) is available in the bankruptcy context. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).

Simons v. *FDIC (In re Simons)*, 908 F.2d 643, 644 (10th Cir. 1990) (per curiam); *Dzikowski* v. *Boomer's Sports & Recreation Ctr., Inc. (In re Boca Arena, Inc.)*, 184 F.3d 1285, 1286 (11th Cir. 1999); see also 1 Lawrence P. King, *Collier on Bankruptcy* ¶ 5.09[2] (15th ed. rev. 2001).

The Fifth Circuit properly dismissed petitioners' appeal pursuant to this well-established rule. The bankruptcy court issued an interim disgorgement order that explicitly anticipates further proceedings to determine the appropriate amounts of fees and expenses to be granted to petitioners and the other professionals. Pet. App. 26 (ordering disgorgement "pending some later determination by the [bankruptcy court] as to entitlement of fees and expenses"). The disgorged funds have not been distributed to creditors but those funds instead have been ordered to be deposited with the court registry to be held until the court has the opportunity to conduct further proceedings and to determine the appropriate amounts to be paid to each of the parties.

The district court similarly recognized the interlocutory nature of the bankruptcy court proceedings. Although the district court did not explicitly grant leave for the parties to appeal the interlocutory order of the bankruptcy court under 28 U.S.C. 158(a), the district court referred to the bankruptcy court's findings as "preliminary" and noted that those findings are "always subject" to later modification or vacatur. Pet. App. 4. The district court further emphasized that its ruling did "not preclude [the bankruptcy court] from

modifying or vacating" its findings and conclusions. *Ibid.*[3]

2. Petitioners identify (Pet. 11-15) a split in the circuits on the question whether a court of appeals has jurisdiction to hear an appeal of a district court decision reviewing a *final* order from the bankruptcy court and remanding for further proceedings. But that split of authority is not implicated by this case. A majority of courts have held that where a final bankruptcy court decision has been appealed and the district court, either affirming or reversing, remands the case to the bankruptcy court, the district court's order is not final unless the remand involves only ministerial action by the bankruptcy court. See *In re Lopez*, 116 F.3d 1191, 1192-1193 (7th Cir.) (citing cases from eight other circuits), cert. denied, 522 U.S. 1014 (1997). By contrast, the Third and the Ninth Circuits have held that a court of appeals has jurisdiction to hear an appeal of a district court order reviewing a final bankruptcy court decision, even though the district court's decision would not otherwise be considered final because it remanded the case back to the bankruptcy court for further proceedings. *In re Continental Airlines, Inc.*, 932 F.2d

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[3] Petitioners err in contending (Pet. 21-28) that the bankruptcy court's findings are final because that court lacked statutory authority to enter the Show Cause Order and violated petitioners' due process rights, and because the bankruptcy court sent its findings and conclusions to the Texas State Board of Accountancy. Petitioners' statutory challenge may be raised upon an appeal from any final bankruptcy and district court order. Moreover, the bankruptcy court's order expressly contemplates further proceedings, Pet. App. 26, and the district court's decision recognizes that the bankruptcy court may change its preliminary findings and that the further proceedings will be consistent with petitioners' due process rights, *id.* at 4.

282, 286 (3d Cir. 1991); *Sambo's Rests., Inc.* v. *Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811, 814 (9th Cir. 1985).

That conflict, however, is not implicated by the decision below because the bankruptcy court's order here is not final. The question that has divided the circuits, therefore, is not even at issue in this case. Moreover, even were the conflict relevant here, the court of appeals' unpublished, per curiam order would be an especially poor vehicle for this Court's review. Indeed, this Court on several occasions has declined to review the circuit split petitioners have identified. See *In re Lopez*, 116 F.3d 1191 (7th Cir.), cert. denied, 522 U.S. 1014 (1997); *Conroe Office Bldg., Ltd.* v. *Nichols (In re Nichols)*, 21 F.3d 690, 692 (5th Cir.), cert. denied, 513 U.S. 962 (1994); *First Nat'l Bank of Tekamah* v. *Hansen (In re Hansen)*, 702 F.2d 728 (8th Cir.), cert. denied, 463 U.S. 1208 (1983); *Official Unsecured Creditors' Comm.* v. *Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 448 (3d Cir. 1982), cert. denied, 459 U.S. 1207 (1983).

3. Petitioners also contend (Pet. 15-28) that the court of appeals' decision conflicts with other decisions of the Fifth Circuit that deem a district court's order of remand final if the remand involves only ministerial action by the bankruptcy court. That alleged intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners' contention lacks merit. The district court's remand order contemplates significant further proceedings by the bankruptcy court to determine petitioners' entitlement to fees. Pet. App. 4. Moreover, the Fifth Circuit adheres to the rule, shared by all circuits, that the courts of appeals have jurisdiction under 28 U.S.C. 158(d) to review only those

district court decisions that review *final* bankruptcy court orders. See *Andrews & Kurth*, 157 F.3d at 420. Because, as noted above, the bankruptcy court order in this case was not final, the district court ruling is also not final under well-settled Fifth Circuit precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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